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**THE LAW**

OF

**USAGES AND CUSTOMS,**

WITH

**ILLUSTRATIVE CASES.**

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**JOHN D. LAWSON,**

**AUTHOR OF "A TREATISE ON THE CONTRACTS OF COMMON CARRIERS," ETC., ETC.**

**ST. LOUIS:**  
**F. H. THOMAS & COMPANY.**  
1881.



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TO THE  
HONORABLE GEORGE W. McCRARY, LL.D.

AUTHOR, LEGISLATOR, JURIST,

NOW

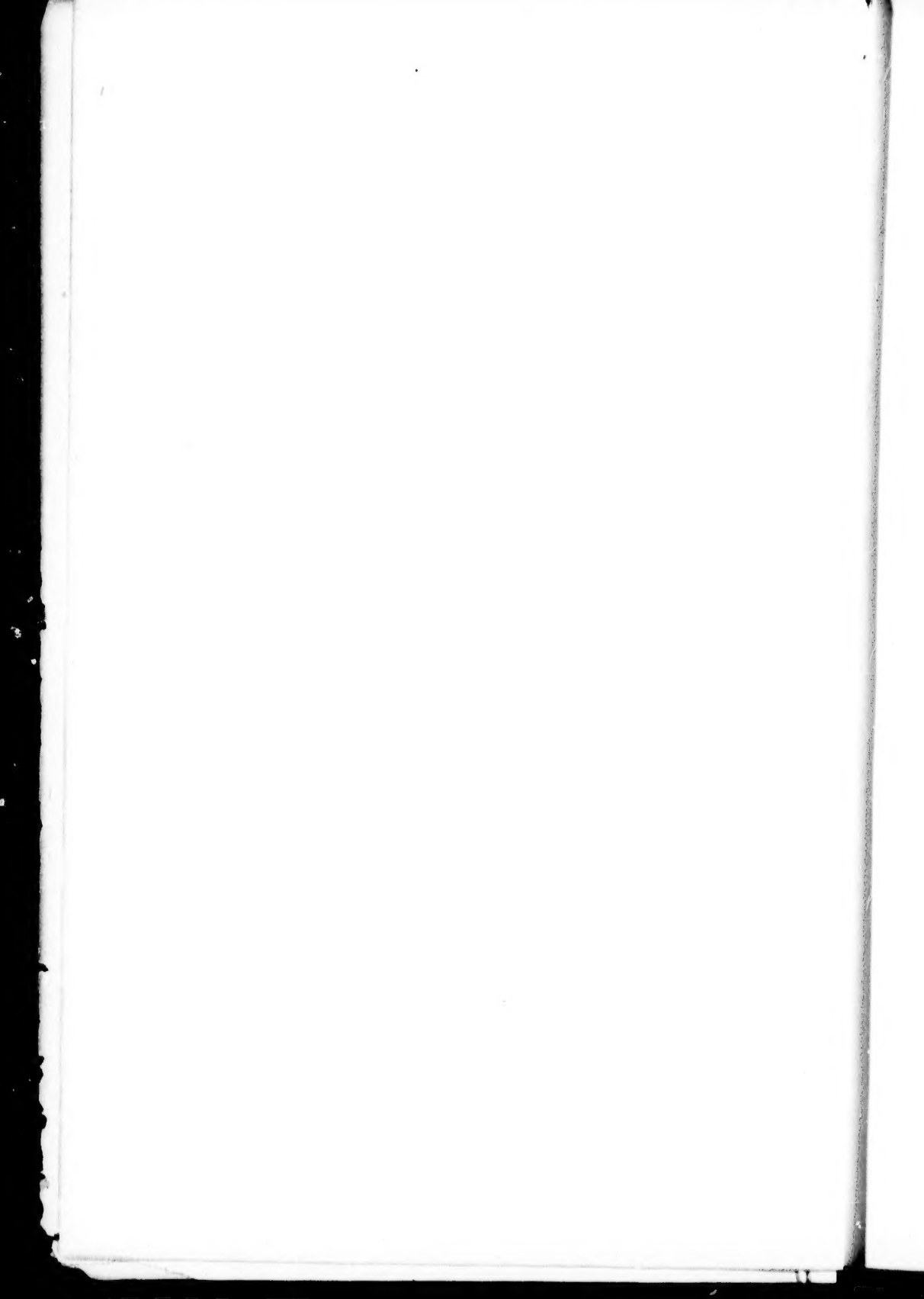
JUDGE OF THE UNITED STATES CIRCUIT COURT

FOR THE

EASTERN DISTRICT OF MISSOURI,

THE FOLLOWING PAGES ARE RESPECTFULLY

DEDICATED.



## PREFACE.

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I cannot refrain from expressing some considerable satisfaction that I am not called upon in this place to repeat the stereotyped apology which, of late years, almost without exception, has accompanied the appearance of a new work on a much-written branch of the law. I am not obliged to call the attention of the profession to the fact that all previous treatises on this subject have lacked certain qualifications which this one supplies. With the exception of a short tract published in England a few years ago,<sup>1</sup> the present I believe to be the first attempt to gather together the numerous cases in which evidence of usage and custom has been received in courts of justice, and to consider in a separate treatise the principles upon which the usages and customs of individuals and trades and occupations are admitted into the law, and are allowed to govern in considering the rights and liabilities of parties to an action. As Mr. BROWNE has pointed out,<sup>2</sup> as a country becomes more civilized its laws of evidence become less strict, because whenever a country is progressive all its laws tend to improve. In the earlier history of our jurisprudence in England, the courts were averse to going outside of the actual contract for the purpose of interpreting it. But our progressive age has given rise, in commercial transactions, to many admirable customs which have pushed their way into the law, and the courts have at last recognized the fact that the practices of the public are not only easy of proof, but are the best evidence of the intention of a party, in the case of a dispute, there being the strongest possible presumption that he who writes a document, or makes an agreement, does as others do, and shapes his conduct according to the manners and usages of his time and place. Hence the importance of this species of evidence at the present day, the tendency of the courts being now towards showing the utmost liberality in admitting evidence of usage and custom, as is sufficiently evident in the frequency with which cases involving the discussion of the admissibility of parol evidence of custom and usage to affect the rights of parties as measured by the general

<sup>1</sup> The Law of Usages and Customs. A Practical Law Tract. By J. H. Balfour Browne. London. 1875.

<sup>2</sup> *Ibid.*

rules of law, or to vary, add incidents to, or explain the meaning of written contracts, have come before the English and American courts within recent years.

As regards the plan of the work, I have experienced a difficulty which is not always encountered by legal writers, in the fact that I have been entirely without a guide in dividing my subject into chapters, and practically without one in its less general divisions. Nevertheless, the cases which I have consulted seem to resolve themselves into five broad and distinct classes, each of which makes a separate chapter in my book. First are those cases in which, for one reason or another, usages and customs have been declared invalid by the courts; and these require an independent examination, and a discussion of the requisites to the validity of a usage or custom (Chap. I.). After these come a considerable number of adjudications where the modes of establishing their existence were examined and laid down by the judges; and these naturally suggest an inquiry into the proof necessary to establish a usage or custom (Chap. II.). Following these is the majority of the decisions—the cases in which the usages of the different relations and occupations were offered in evidence to affect the rights and liabilities of persons in their dealings with one another (Chap. III.). A fourth class embraces those cases in which oral or written contracts are to be explained by the incidents of the business out of which the contract came; and the extent of this subject demands that it shall be presented in a separate chapter (Chap. IV.). Finally, and hardly less important, are the cases in which the usage, when offered in evidence, was found to conflict with an express agreement between the parties whose actions it was introduced to affect, or with a legislative act, or with a rule of public policy; and these are embraced in my concluding chapter (Chap. V.). So far, I believe my arrangement to be not only practical, but logical, even if I cannot claim the latter for the further divisions of my work. Here it will be found that I have classed the different adjudications on the basis of the different trades and callings in which the usages were formed, or the different instruments in the interpretation of which they were admitted. As I have pointed out further on,<sup>1</sup> this arrangement appears to merit the criticism which it has received. It would seem that the mere fact that the usages were in themselves different would be nearly as intelligible a ground for classification as the one adopted. Nevertheless this is the arrangement of the digesters, and it must be admitted that no really scientific classification is possible. I would again ask the reader to bear in mind that the legal principles which are to determine the admissibility or inadmis-

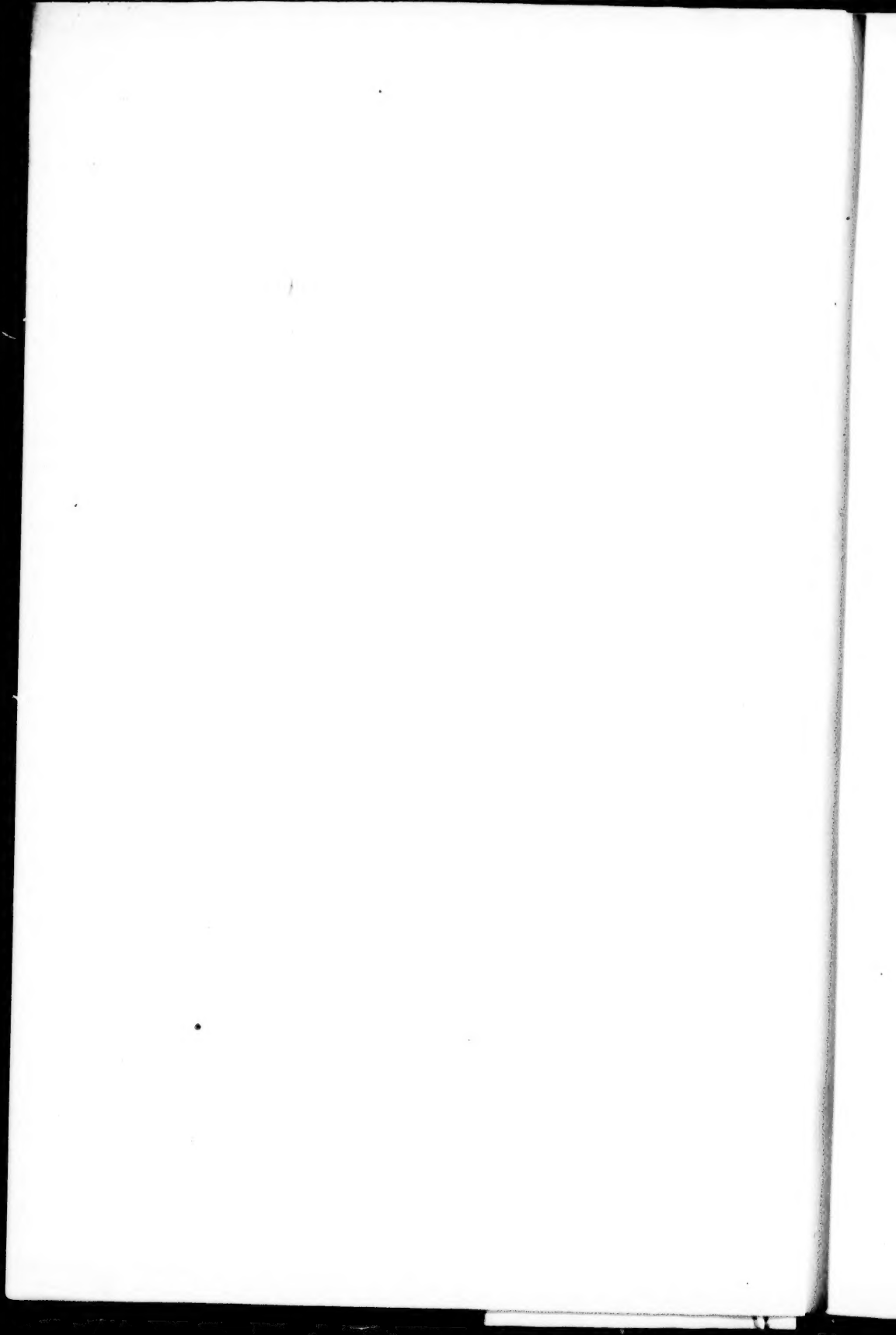
<sup>1</sup> See *post*, Chap. IV., § 182.

sibility of usages and customs by courts of law are the same in all relations; that there can be no difference because in one case the usage is admitted to affect the rights of an insurer or a common carrier, and in another those of a merchant's employee or a foreign factor; that the correct result cannot be reached by examining whether the parties were manufacturers or tradesmen or farmers, where the question is simply whether evidence of usage is to be allowed to explain the meaning of a technical or common word in a contract or in a receipt. If this is not lost sight of, my classification will be found to be the best, as it renders the access to particular precedents more easy and ready in future cases.

Another word as to the form of the book. I have called the work a TREATISE, although I have presented it in the form of illustrative or leading cases, with notes. But in doing this I have not misnamed it in order to obtain for my work a more dignified title. *The notes are my treatise.* If any one should object that he is called upon to pay for one hundred and fifty pages of cases taken bodily from the reports, which are at his hand in his own library, or which he can consult elsewhere, I shall simply reply that he obtains them without any extra charge. In order to admit them into my book, the notes are printed in a type three sizes smaller than that in which legal treatises are ordinarily printed. Thus, while neither its size nor its cost to the profession has been increased at all, I am satisfied that its usefulness to the many members of the bar who are unable to obtain access to a *complete* library of reports will be greater in its present than it would have been in the more usual form of a legal text-book. And even those who can obtain in their original volumes all the cases I have here reprinted, will hardly refuse to recognize the desirability of having within the covers of a single volume *all* the leading cases upon this branch of the law. I have endeavored to accomplish this; and by quoting freely from the opinions of the judges, by making the statements of the facts of most of the cases cited minute as well as correct, and by embracing *all* the adjudications on the subject, I have aimed to make my book take the place, for the judge and practitioner, not alone of a treatise, but of the original reports of the several thousand adjudications on the law of usages and customs which it contains.

JOHN D. LAWSON.

ST. LOUIS, Mo., September, 1881.



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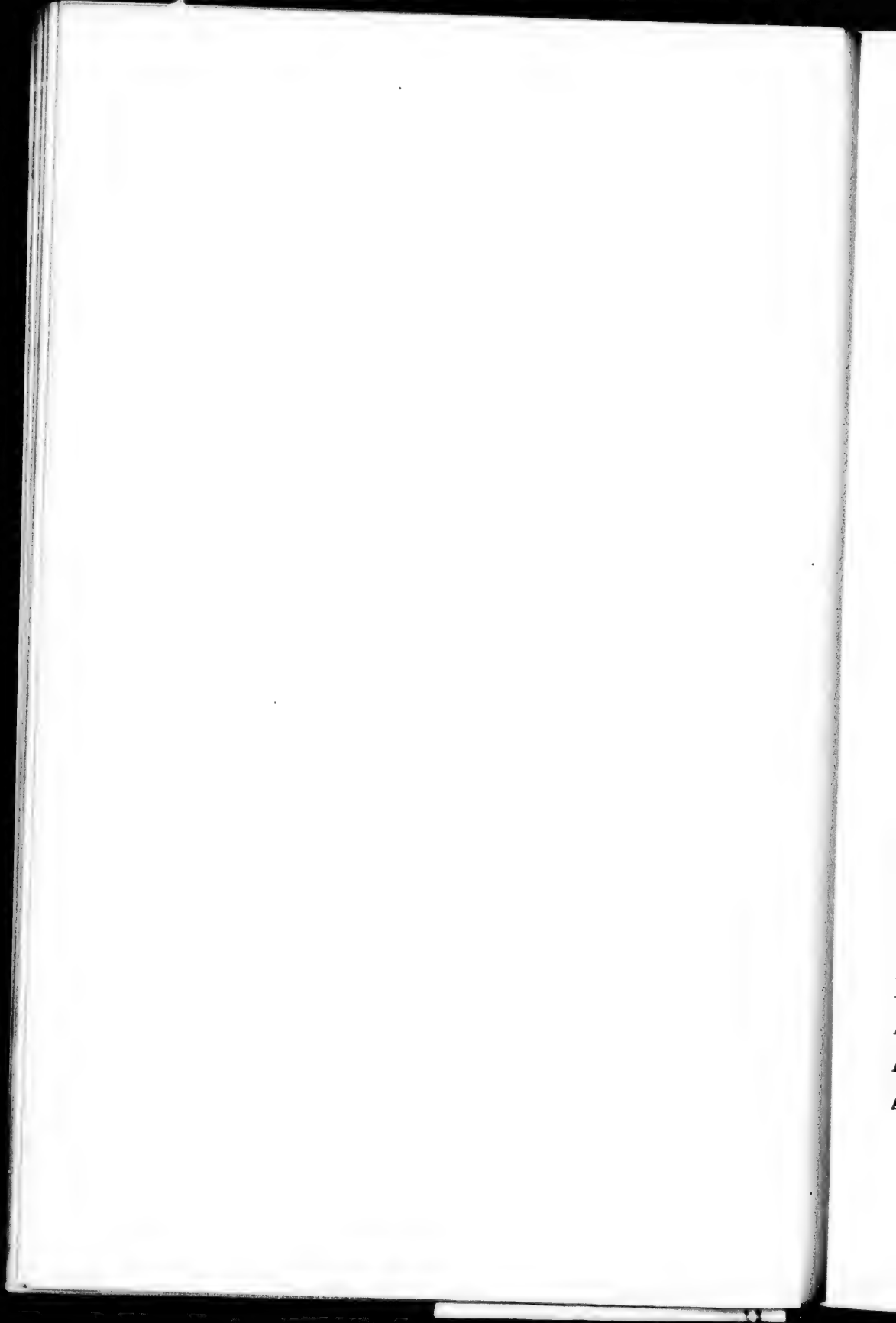
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# THE LAW OF USAGES AND CUSTOMS.

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## CHAPTER I. ON THE REQUISITES TO THEIR VALIDITY.

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 1. A USAGE MUST BE ESTABLISHED.

## SEWELL v. CORP.\*

*Before Best, C. J., in the English Court of Common Pleas, Trinity Term, 1824.*

A usage applicable to a particular trade or profession, if established, need not be ancient.

ASSUMPSIT by a veterinary surgeon for attendance and medicines furnished to the defendant's horse. A certificate of the plaintiff's having attended lectures at the veterinary college, signed by Mr. Coleman, the professor there, and several others, was tendered in evidence on the part of the plaintiff.

\* Reported 1 Car. & P. 392.

Illustrative Cases.

BEST, C. J., refused to receive it, on the ground that it did not come from any public body known to the law.

Mr. Coleman was called as a witness, and asked by the plaintiff's counsel whether, to his knowledge, it was the custom to pay veterinary surgeons for attendance as well as medicines.

Vaughan, Serjt., objected. There is no custom; this is all modern.

BEST, C. J. — They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. You may cross-examine as to the extent of the usage. With respect to veterinary surgeons, I know of no law that applies to them particularly. If there is no contract, they must go on a *quantum meruit*. There is a usage for a broker to have commission. If there is a usage here, it is evidence to regulate the claim. I see no objection to the general question as proposed.

Mr. Coleman then stated that the general rule was to charge for attendance when there was not much medicine required.

BEST, C. J. — Such a usage is too uncertain.

The plaintiff then went on a *quantum meruit*, and proved several attendances.

Vaughan, Serjt., contended that, by analogy to the case of apothecaries, the jury could not legally give anything for attendances.

The sum of £112s 6d, for the medicine furnished, had been paid into court.

BEST, C. J., left it to the jury to say whether that sum was or was not sufficient for the plaintiff's services and medicines.

*Verdict for the plaintiff. Damages, 17s 6d.*

2. A USAGE MUST BE CERTAIN AND UNIFORM.

WOOD v. WOOD.\*

*Before Burrough, J., in the English Court of Common Pleas, Michaelmas Term, 1823.*

The usage of a particular trade must be certain and uniform to make it binding on transactions in that trade.

TROVER for cloth. On the part of the plaintiff, after proof of the bankruptcy, it was proved that at the time of his bankruptcy the bank-

\* Reported 1 Cgr. & P. 59.

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Wood v. Wood.

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rupt had his cloth in his possession, he trading in that article, and that the defendant got it into his possession and would not give it up. The defence set up was that the defendant, who was the owner of the cloth, had sent these cloths to the bankrupt for inspection, and that he was, by the usage of the cloth-trade, to send an answer to the defendant whether he would buy them or not, and that if he did not in three days say that he would buy them, the seller, by the usage of the cloth-trade, was to send for and receive them back again. To prove this usage of the trade, several witnesses were called, all of whom spoke of a usage in the cloth-trade to send goods for inspection; but some of them spoke of three days as the time within which the buyer was to say whether he would buy them or not; others spoke of a week, and one of a month, as the time.

*Pell*, Serjt., in reply, relied on a case being made out, under the statute of 21 James I., c. 19, of reputed ownership in the bankrupt, and cited a *dictum* of LE BLANC, J., in which the judge laid down that if a trader has got goods in his possession, with the option of returning the goods, but does not return them before he becomes a bankrupt, the goods will pass to his assignees, though they made no part of the bankrupt stock.

BURROUGH, J. — If goods are in the hands of a bankrupt at the time of his bankruptcy, generally speaking, they will go to his assignees, under the statute of James, though there is no pretence of any sale to the bankrupt, or that they are really his property. Special facts may take a case out of this general state of things. It has been contended that in the cloth-trade there is a certain usage relative to the return of cloth sent for inspection. Such a usage must, to be binding, be uniform and universal, and not merely the way of dealing at particular houses. It must be so universal that every one in the trade must be taken to know it. If it is not so, it is no usage at all. Here there seems to be no certain rule or usage, for the witnesses do not give it as certain or uniform; but if there be such a usage, I am of opinion that it would take the case out of the statute of James.

*Verdict for the plaintiff. Damages, £141.*

## Illustrative Cases.

## 3. A CUSTOM MUST BE GENERAL.

## WOMERSLEY v. DALLY.\*

*In the English Court of Exchequer, April, 1857.*SIR FREDERICK POLLOCK, Kt., *Chief Baron.*

" JAMES PARKE, Kt.,

" EDWARD HALL ALDERSON, Kt.,

" THOMAS JOSHUA PLATT, Kt.,

" SAMUEL MARTIN, Kt.,

" GEORGE WILLIAM WILSHERE BRAMWELL, Kt.,

} *Barons.*

The rule of law as to importing into the terms of a tenancy the custom of the country does not admit of evidence of the usage of a particular estate or the property of a particular individual, however extensive it may be.

THIS was an action by an outgoing tenant against tenants in common, who were assignees of the reversion of part of the demised premises.

The declaration stated that the plaintiff was tenant to the defendants, on the terms that he should cultivate according to the custom of the country, and that they should, on the termination of the tenancy by notice, pay to him such reasonable allowances as he should, according to the custom of the country, be entitled to receive as outgoing tenant, in respect of work, etc.; and then averring that the defendants terminated the tenancy by notice, and that he was entitled to receive, according to the custom of the country, a certain sum for work, etc.

Pleas denying the plaintiff's tenancy to the defendants on the terms stated, and denying that he was entitled to such allowance as alleged.

On the trial before MARTIN, B., at the York Lent Assizes, it appeared that the plaintiff had been for fifty years tenant of a farm of forty acres belonging to an extensive estate, the property of a family of the name of Thornhill, and that the defendants had purchased certain portions of the estate, including about sixteen acres, portions of the farm in question, subject to the condition of payment to the outgoing tenants of the amount of valuation, according to the custom of the country. The defendants proposed to offer evidence of a usage on the Thornhill estate that in all lettings it should be understood that the tenants should keep one-third of their farm arable and two-thirds in grass, and pay £5 an acre, on leaving, for any excess beyond that proportion of arable over grass. The learned judge rejected the evidence, it not appearing that the plaintiff was cognizant of the alleged usage. The plaintiff had a verdict, and the points were reserved.

\* Reported 26 L. J. (Exch.) 219.

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 Stevens v. Reeves.
 

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*Knowles*, for the defendant, now moved for a rule to set aside the verdict, and for a new trial. The evidence of the usage was admissible, on the same principle as that on which evidence of the "custom of the country" is admitted.

**POLLOCK, C. B.** — No. The law takes cognizance of the divisions of the country into counties or parishes, which are legal and public divisions, but not into properties or estates, which are purely private in their nature. Estates may be very small, and if large are only accidentally so. It would be impossible to draw any legal distinction between an estate of one hundred acres or of one hundred thousand, and there would be no legal presumption of notoriety arising from the fact of usage as to terms of letting on a particular estate. *Non constat* that the party becoming tenant upon it for the first time would hear of it.

*Knowles*. — There was evidence for the jury that the plaintiff must have heard of it.

**POLLOCK, C. B.** — Not a word appears to have been said about it.

*Knowles*. — Assuming that the tenant heard of it, his not saying anything about it would be evidence of a tacit assent to it.

**BRAMWELL, B.** — No more than if it were proved that a defendant sued for a debt, always in other cases had dealt on terms of credit. That might be some moral evidence that he had done so on the particular occasion in question, but it would be no legal evidence.

*Per Curiam*. — The evidence was clearly not admissible. It was only as to the practice of a particular person in letting his farms — a practice not proved to have been known to the tenant. That being so, the other point does not strictly arise.

*Rule refused.*

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 4. A USAGE MUST BE KNOWN.

## STEVENS v. REEVES.\*

*In the Supreme Judicial Court of Massachusetts, November Term, 1829.*

HON. ISAAC PARKER, *Chief Justice*.

" SAMUEL PUTNAM, }  
 " SAMUEL S. WILDE, } *Judges*.  
 " MARCUS MORTON, }

1. A person entering into a contract is not bound by the usage of a particular business, unless it is so general as to furnish a presumption of knowledge, or it is proved that he was acquainted with it.

\* Reported 9 Pick. 198.

## Illustrative Cases.

2. It was a rule in a cotton-factory in A., and some neighboring factories, that no person employed should leave their service without giving a fortnight's notice of his intention to quit. A weaver who did not know of this rule worked in the factory without any agreement as to the terms of service, but was paid by the yard for the work which he turned out. He left the factory without giving any previous notice. *Held*, that the rule was not binding on him, and that he therefore was not liable to an action for damages by the owner of the factory for thus leaving.

This was *assumpsit* for a breach of contract of the defendant in quitting the service of the plaintiff, in which he was engaged as a weaver, without giving a fortnight's previous notice.

In the Common Pleas, where the parties agreed upon a case, a non-suit was directed; and the case was brought before this court by exceptions.

The facts, as agreed by the parties, are as follows:—

On the 3d of July, 1828, Reeves, the defendant, came to the woollen-factory of the plaintiff, in Andover, and asked the overseer of the weaving-room "if he had a loom idle," and on being answered in the affirmative, engaged to work on a loom there. On the second week of Reeves' engagement he left his work at the factory without notice or leave, and was absent two or three days, and then returned and resumed his work. Reeves was paid for his work by the piece, at the same rate a yard as the other weavers in the same factory. When he had earned about ten dollars, Stevens, at his request, paid him that amount. At the time Stevens made this payment he knew, but not from Reeves himself, that Reeves had engaged a loom in another factory. About the 21st of July, Reeves left the employment of Stevens, without his consent and without having given any previous notice to Stevens.

No agreement was made between the parties as to the price that Reeves should receive for his labor, nor as to the time that he should continue in Stevens' employment, other than may be implied from the circumstances of the case. It was proved that it was the usage in Stevens' factory to give a fortnight's notice before quitting, and this was generally understood by the workmen. But Reeves had no information given him of this usage, and there was no notice of it posted up, and is not usually communicated to those who labor in the factory, at the time of their engagement. It was proved that there was a similar usage in other factories in the vicinity, and that notice of it was commonly posted up with other rules. In every factory there are certain rules for the regulation of the workmen in respect to their quitting the factory.

Reeves constantly follows the occupation of a weaver, but at the time when he was engaged by the plaintiff he had just arrived in this country.

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Stevens v. Reeves.

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Stevens sustained an actual damage in consequence of Reeves' quitting his service.

The case was argued, in writing, by *Spaulding* for the plaintiff and *Crosby* for the defendant.

*Spaulding* contended that when the defendant entered as a weaver into the service of the plaintiff, as he made no specific contract, he impliedly agreed to serve upon the same terms as the other persons employed in the same factory, and to be bound by the rules of the factory; and that the defendant, by leaving without notice, broke his contract, and thereby became liable to pay the plaintiff the damages which it is admitted the plaintiff suffered in consequence. It is obvious that the defendant knew of the usage of the factory in this respect; otherwise he would not, when he applied for his pay, have concealed his intention of leaving. But he is bound by the usage, whether he in fact knew it or not. Every factory has rules. If he neglected to ascertain the rules of the factory in which he was going to serve, it was his own fault. The pay which he received was calculated according to the rules of the factory, as he made no special agreement on the subject, and he no doubt could have recovered it according to that rate. If he is entitled to the benefit of the rules, he ought to be bound by them. The usage of an individual is binding on any one dealing with him, who is acquainted with it. But the practice of giving notice is not confined to the plaintiff's factory: it is a general usage in the vicinity. It is a reasonable usage, and for the benefit of both parties. Where a person enters into a contract in a particular business, the legal effect of it is regulated by the usages of this business, even where the party is in fact ignorant of them. The present case is somewhat like that of a person dealing with a bank. He is bound by the usage of the bank, even where it changes the legal effect of the contract. The case is also analogous to that of landlord and tenant. The right to notice to quit arises from the mere existence of the relation, without any special agreement; and so, in particular places, both landlord and tenant are bound by the usages of the place in which the land lies.

*Crosby*. — The rule of the plaintiff's factory on the subject of notice cannot affect the contract of service entered into by the defendant, as it was not a well-established, general, and uniform usage. The evidence shows the usage to exist only in the plaintiff's factory and others in the immediate vicinity.<sup>1</sup> The private usages of individuals and corporations — such as of particular carriers, banks, and merchants — are binding on a person who deals with them only where he is acquainted with

<sup>1</sup> 2 Stark. on Ev. 451, 453; Wood v. Wood, Ph. on Ev. 496; Smith v. Weight, 1 Caines, 43; Barber v. Bruce, 3 Conn. 9.  
1 Car. & P. 59; Yates v. Pym, 6 Taun. 446;



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 Illustrative Cases.
 

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those usages. In the present case, the defendant, who, it is clear, did not know the rule of the plaintiff's factory, could not be bound by it.

PARKER, C. J., drew up the opinion of the court.

This action is brought to recover damages against the defendant for quitting the plaintiff's service in violation of an alleged contract that, having entered into the service, he would not quit it without leave, unless he had given a fortnight's notice of his intention to quit.

It does not appear that the defendant engaged his services for any length of time. He asked leave to work at an unoccupied loom; worked a few days, went away, returned in a short time, and worked upon another loom. He was to be paid according to the work turned out, and not by the year, month, or day. There was no stipulation for any particular time; so that there is no express or implied contract that he would remain for any certain time, unless such contract is to be implied from what is set up in evidence as a usage of this and the neighboring factories, that all who are employed shall be held to remain until a fortnight after they give notice of their intention to quit. In order to make this a part of the contract, as the usage supposed is a particular one, and not a general custom, it should have appeared that the defendant knew of the usage when he entered upon the work, or before he left it. This is required in order to give effect to a particular usage so as to operate upon a contract. It is so with the usage of banks, and all other usages not of so general a nature as to furnish a presumption of knowledge. There is no such evidence in this case; on the contrary, it appears that the defendant was a stranger in the country, that he was not informed of any usage, and that no notice of it was posted up among the rules and orders of the factory.

The cases cited are all either of general usages or of particular customs, of which the party to be bound was proved or presumed to have notice.

*The plaintiff must be nonsuited.*

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 5. A CUSTOM MUST BE MORAL.

SEAGAR v. SLINGERLAND.\*

*In the Supreme Court of New York, November, 1804.*

In an action by one for the seduction of his daughter, a custom of "bundling"—i.e., for persons courting to sleep together—cannot be set up by him to excuse his connivance at the intercourse.

\* Reported 2 *Chances*, 219.



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Seagar v. Sliengerland.

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THIS was an action for debauching the plaintiff's daughter, whereby he lost her service and was put to expense in her lying-in, etc. The defendant applied, on a case made and submitted without argument, to set aside the verdict, which was for \$450, as being contrary to law, against evidence, and because the damages were excessive.

At the trial, the plaintiff's principal witness was his own daughter. She testified that the defendant, after a promise of marriage, frequently lay with her, and at length got her with child; that long before the period the plaintiff and his wife knew that she and the defendant slept together at their house, without forbidding or discountenancing the intercourse; that before her pregnancy her mother, in particular, had twice seen them in bed together.

*Per Curiam.* — From the summary of the testimony, we are constrained to say there ought to have been a verdict for the defendant. In actions of this nature, the daughter is supposed to be violated with force, against the will and consent of the father. It is then, and then only, that he is entitled to compensation for the loss of her service. But when he consents or connives at the criminal intercourse, he seeks with very ill grace a retribution in damages. *Volenti not fit injuria.* If he be not *particeps criminis*, he is something very like it. His assurance in coming here for redress can be equalled only by the indifference with which he submitted to the sacrifice of his daughter's chastity. We lay out of view the custom which, it is agreed, prevails in that part of the country for young people who are courting to sleep together; nor can we conceive why this custom has been pressed into the plaintiff's service. If it furnishes an excuse for his carelessness or his daughter's indiscretion, it is some apology also for the defendant. At any rate, parents who countenance or take no pains to abolish, at least within their own walls, a practice so indecorous or dangerous have no right to complain, or ask satisfaction for consequences which must so naturally follow from it. Nor is it an excuse for the parent to say that promises of marriage had been exchanged. If, under such engagements, he thought there was no harm in permitting what nothing but wedlock itself should have sanctioned, he knew the risk to which his daughter was exposed. These vows might be broken, or the young lady (as there is too much reason to believe was the case here) might by her own indiscreet behavior justify the lover in transferring his affections to some other object. On the daughter's behavior, however, it is not necessary now to dwell, as we are not showing what measure of damages would have been just, but that none at all ought to have been given. This will more properly become a subject of inquiry if she shall think

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proper to bring an action for a breach of the marriage promise. The father's conduct is more immediately in question in this suit; and as that was in the highest degree exceptionable, — as he consented to it, if he did not encourage, knew of, and took no means to prevent the connection which has produced this action, — we think it cannot be maintained. The verdict is therefore against law, and a new trial must be had. The judge having refused to nonsuit the plaintiff, as he ought to have done, the costs of the former trial must abide the event of the suit.

*New trial.*

## G. A USAGE MUST BE REASONABLE.

## PAXTON v. COURTNEY.\*

*Before Mr. Justice Keating, in the Court of Common Pleas, London Sittings, Trinity Term, 1860.*

A custom or usage of trade must be reasonable, and is not so if it is such as honest and right-minded men would deem unfair and unrighteous. So held of a usage of undertakers to charge the original cost of articles used at any funeral, although they might be used at other funerals.

ACTION against executors for work, etc., done by the plaintiff as an undertaker. Plea: Never indebted except as to £75 paid into court.

*Knowles and Willoughby*, for the plaintiff; *Edwin James and T. J. Clark*, for the defendants.

The dispute being wholly as to amount, and turning on the propriety of certain charges on the part of the plaintiff, evidence was tendered of a usage in the undertaking business that undertakers should, in each funeral, charge the entire original cost of certain articles of funeral feature used (gloves, bands, etc.), although they might be used at other funerals.

KEATING, J. — I will not exclude the evidence, but it is a principle of law that a custom must be reasonable;<sup>1</sup> that is, that it must not be unreasonable. I shall put that to the jury.

The evidence was accordingly given, and at the close of the case —

KEATING, J., told the jury that in order to find for the plaintiff for

\* Reported 2 Post. & Fin. 131.

<sup>1</sup> In one case Maule, J., said, as illustrating this principle of law: "It is a usage in the strawberry business to put all the big strawberries at the top of the pottle, and all the bad ones at the bottom; but that would

hardly be a valid custom as against a purchaser who bought a fair pottle." See *Taylor v. Devey*, 7 Ad. & E. 409; *Jones v. Waters*, 5 Tyrw. 981; *Sanders v. Jameson*, 2 Car. & Kir. 257.

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Metcalf v. Weld.

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the higher scale of charges, on the ground of the alleged custom or usage, they must be satisfied that it was such a custom as was reasonable; that is, such as was fair and proper, and such as reasonable, honest, and righteous men would adopt. If they thought it unrighteous, and so unreasonable, then they ought not to found a verdict upon it.

*Verdict for the defendants.*

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7. SAME PRINCIPLE.

METCALF v. WELD.\*

*In the Supreme Judicial Court of Massachusetts, November, 1859.*

HON. LEMUEL SHAW, *Chief Justice.*

" CHARLES A. DEWEY,	} <i>Judges.</i>
" THOMAS METCALF,	
" GEORGE T. RIGELOW,	
" PLINY MERRICK,	
" EBENEZER R. HOAR,	

A custom of a particular port that seamen's advance wages due under shipping-articles shall be paid to the shipping-agent, to be paid by him to the boarding-house keeper bringing the seamen, for their benefit, is unreasonable, and does not bind the seamen, although known to them at the time of signing the articles.

ACTIONS of contract by seamen to recover "advance wages" under shipping-articles, in common form, by which "it is agreed between the master and seamen or mariners of the brig *Latillia*," etc., "now bound for the port of Boston," etc., "that in consideration of the monthly or other wages against each respective seaman or mariner's name hereunder set, they severally shall and will perform the above-mentioned voyage; and the said master does hereby agree with or hire the said seamen or mariners for the said voyage, at such monthly wages or prices, to be paid pursuant to this agreement and the laws of the Congress of the United States." Answer: Payment. The parties waived a trial by jury, under the statute of 1857, chap. 267, and the cases were heard together in the Superior Court of Suffolk, at the September term, 1858, by MORRIS, J.; who signed the following bill of exceptions:—

"The defendants offered evidence tending to show that it is the custom in the port of Boston, where the plaintiffs were shipped, for owners of vessels to obtain their seamen through a shipping-agent, and

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to pay the advance wages agreed in the shipping-articles to the shipping-agent; and that such shipping-agent pays the same to the boarding-house keeper who brings the seamen to him; and the boarding-house keeper pays or accounts for the same to the seamen.

"It was shown that the money, at the time of the shipment, was not paid by the defendants to the shipping-agent, but was charged to the defendants by him on his books and the amount, together with his own charges, was paid to the agent on a subsequent settlement of the defendants' account with him.

"It was also shown that the plaintiffs in these cases knew of this custom, and that the defendants, according to said custom, paid, in the manner above set forth, to the shipping-agent who shipped the plaintiffs, the sum of \$20 each, being the advance wages agreed upon in the shipping-articles signed by the plaintiffs.

"The plaintiffs objected to the above evidence as incompetent, and contended that the written contract excluded parol evidence of such a custom as above set forth; and that the same, if proved, would be an illegal and unreasonable custom, and contrary to the policy of the law. But the court overruled the objections and admitted the evidence.

"The court being satisfied that the custom existed, and that it was known to both parties, and that the contract was made with reference to and under it, and that the defendants had paid the advance wages under it to the shipping-agent, ruled that the custom was a reasonable and proper one, and gave judgment for the defendants in each case."

*C. G. Thomas*, for the plaintiffs.

*J. A. Andrew*, for the defendants. — The finding of the court below establishes the existence of the custom relied upon, that the plaintiffs knew of it, that they acted in accordance with that knowledge, and that the defendants paid the money according to the custom. Nothing in the shipping-articles excluded the method of proof of payment which was adopted; for, taking the articles as they stand, the question was, Were the plaintiffs paid before sailing? Nor is it unreasonable or illegal that owners and seamen should agree to deposit advance wages of seamen in the hands of a third party, in order to secure to the seamen the benefit of an "advance," and to the owners of the vessel the presence of the seamen when needed.

*HOAR, J.* — Three questions arise upon this bill of exceptions: —

First. Was the payment made by the defendants of the advance wages due to the plaintiffs in these actions the proper subject of a "custom" of the port of Boston?

Second. Was the custom proved at the trial a reasonable custom?

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Metcalf v. Weld.

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Third. Was the payment proved to have been made according to the custom?

A negative answer to either of these questions would require the judgment of the court below to be set aside and a new trial granted; and we are of opinion that neither can be answered affirmatively.

1. The seamen made a written contract directly with the owners. By the terms of that contract they were entitled to receive a stipulated sum as advance wages. The custom relied on in the defence is a custom for the owners to pay this advance to their shipping-agent, who is employed by them to procure a crew, and for him in his turn to pay it to the boarding-house keeper who brings the seamen to him. It is not a question of the meaning of terms in a contract which have a meaning peculiar to the port of Boston, and known to the contracting parties. The contract is intelligible and complete in itself. It obliges the defendants to pay, and entitles the plaintiff to receive, a certain sum of money at a certain time. Under such a contract, we do not think the mode of payment is the proper subject of a custom, and no authority has been cited in support of such a proposition. It would amount to a custom of seamen to employ a certain class of agents—a custom for the owners to transfer the direct personal responsibility resting upon them to another, and perhaps an irresponsible party. There are many usages of trade which have nothing to do with the contracts of parties, and which cannot be set up to modify or control them. It is very customary for merchants to pay their debts by checks upon a bank; and this may be very well known to persons who deal with them, and yet no one is bound to receive a check in discharge of a promise to pay money. It may be a custom in some kinds of business to pay workmen in orders for goods, or in goods kept for sale by their employer, or not to pay wages punctually at the time they are due, and the fears or necessities of the laborer may induce him to yield to the custom and accept payment in a manner or at a time convenient to the employer; but it would hardly be contended that such a custom could be regarded in determining the legal effect of a written agreement. We fear it would not be difficult to prove a custom in many ports to defraud and impose upon seamen in various ways,—a custom to subject their persons and property to a kind and degree of control which has its origin only in their ignorance and vices.—but these are not the customs which give an interpretation to their contracts.

2. But if there could be a custom respecting the manner of payment of the plaintiffs' wages, we do not consider the custom proved in these cases a reasonable or proper custom. It is a custom for one of the

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 Illustrative Cases — Definitions.
 

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contracting parties to put himself under the tutelage or guardianship of a particular class of men, and interferes with his right to the direct control and enjoyment of the fruits of his own labor. It seems to require that the sailor should be in the charge of some boarding-house keeper, and either be in debt to him or bound to deal with him for the future. Unfortunately, this is too often the actual fact. The power which the keepers of boarding-houses for seamen practically exercise over their customers is liable to great abuse, and we cannot think it wise or salutary that it should receive any extension or encouragement. A custom is not reasonable which allows a payment by the owners to their own agent, with a payment by him to some boarding-house keeper to whom the sailor is under no legal obligation, and may not choose to constitute and trust as his agent. A principle nearly analogous was applied in the case of *Boren v. Stoddard*.<sup>1</sup>

3. But, whatever the nature of the custom, the evidence in the cases before us did not show that it had been complied with. The money was not even paid by the owners to the shipping-agent at the time it was due, but was charged by him in account. It does not appear that the plaintiffs had any relations to a boarding-house keeper, or that the advance wages have ever been paid to any one for their use. If any boarding-house keeper authorized by them to receive the money had actually received it, so that it had gone in any manner to their use, the defence might have been placed upon the ground of agency. But it certainly cannot be maintained that the defendants can discharge themselves by a mere transfer of their obligation to their own agent.

*Exceptions sustained.*

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 NOTES.
 

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§ 1. Definitions.—The Common-Law Customs.—A custom is a law established by long usage.<sup>2</sup> Common-law customs are either general or particular. General customs are those which prevail throughout the whole country; particular customs are those which prevail among and affect only the inhabitants of a particular place or the members of a particular class.<sup>3</sup> General customs are the

<sup>1</sup> 10 Metc. 381.

<sup>2</sup> *Wileox v. Wood*, 9 Wend. 346. Custom differs from prescription in this: that while prescription is the making of a right, custom is the making of a law. *Browne on Usages & Customs*, 14; 2 Bla. Comm. 283; *Mayor of Linn Regis v. Taylor*, 3 Lev. 160. The Louisiana Civil Code defines customs thus: "Customs result from a long series of actions constantly repeated, which have by such repetition and by uninterrupted acquies-

cence acquired the force of a tacit and common consent." Art. 3, chap. 1.

<sup>3</sup> Customs are either general or particular. General customs are such as prevail throughout a country, and become the law of that country; particular customs are such as prevail in some county, city, town, parish, or place. The existence of the former is to be determined by the court; that of the latter by the jury. *Browne on Usages & Customs*, 7; *Bodfish v. Fox*, 23 Me. 90.

## General and Particular Customs.

common law; and of them, therefore, little will be said, as they do not fall within the scope of this treatise. By them, in numbers of instances, where the legislature had not prescribed express rules, the proceedings and determinations of the English courts were guided and directed; by them were settled and determined the mode in which lands should descend; the methods by which they might be acquired and transferred; the requisites and obligations of contracts; the rules for the construction of contracts, statutes, deeds, and wills; the remedies for civil injuries, and the like. General customs established such fundamental rules of the common law as these — rules, some of which still exist and have successfully defied legislative innovation: That the eldest son is the heir to his ancestor; that a deed, to be valid, must be sealed and delivered; that wills shall be construed liberally, and deeds strictly; that money lent upon bond is recoverable by an action of debt; that breaking the public peace is an offence punishable by fine and imprisonment. These customs, recognized by the courts as the way in which prior facts were dealt with by the people, or by a forgotten law-making power,<sup>1</sup> became established rules for future guidance. The evidences of those customs which constitute the common law are to be found, then, in the decisions of the courts as published in the reports and in the writings of the old authors — Glanville, Bracton, Britton, Fleta, Littleton, Statham, Brooke, Fitzherbert, Staundford, Hengham, and Coke.

The particular customs of the English common law will not be discussed here at length, as they are of little interest to the American lawyer, and of little value in a practical text-book of the law as it exists in this country. "These particular customs," says Mr. Browne,<sup>2</sup> "which are contrary to the general law of the land, are the remains of a multitude of local customs prevailing, some in one part, some in another, over the whole country, while it was divided into separate dominions. When these separate kingdoms became united under one rule, a unity of custom was the inevitable result, and this unity of custom was the cause of our uniformity of laws. The history of law is parallel to the history of race. And, just as many races under one peaceful rule will become one race, — representing in a modified form the peculiarity of each, — so, many systems of laws — or those hypotheses of laws, or provisional laws, customs — will under one rule become one system, which will have the modified characteristics of many of the systems from which it derived its origin. But, further: just as in ethnology we discover instances in which a race, even under the most favorable conditions, has remained distinct and separate in the midst of another race, although living under a common rule, and associated in peace, in intercourse, and in commerce, so we find in the study of jurisprudence that certain customs or systems of laws have remained separate and distinct in the midst of a wide and uniform law, and have retained their characteristic peculiarities in spite of many conditions which favored an amalgamation and a unification of these various systems. These so-called customs have in many cases been confirmed to the districts which have the privilege of enjoying them, by various acts of Parliament."

<sup>1</sup> Every custom, it is said, supposes an act of Parliament or a law made in former times by an equivalent power, though it were not called a parliament. *Brown on Corp.* 29; *Harland v. Cooke*, *Freem.* 320. Yet it does not follow that whatever the legislature

might have enacted is necessarily a good custom; for such a rule would sustain an unreasonable custom. *Weekly v. Wildman*, 1 *Ld. Raym.* 407.

<sup>2</sup> *Browne on Usages & Customs*, 8.



## Particular Customs.

Instances of these customs are the custom of gavelkind in Kent, by which, amongst other things, all the sons, and not the eldest only, succeeded to their father's inheritance; the custom of borough English, prevailing in other counties, by which the youngest son inherited the estate in preference to all his elder brothers;<sup>1</sup> the customs of other boroughs, which entitled a widow to all her husband's lands for her dower, instead of the one-third to which she was entitled by the general law; the customs of manors,<sup>2</sup> and the particular customs of the city of London.<sup>3</sup> As we have said, particular common-law customs are not frequently met with in the United States. Some there are, indeed, which even our courts will notice judicially—as, the custom or law of the road, that horses and carriages shall keep to the right side in passing, or the custom as to vessels passing on rivers. Others there are, also, which will be pointed out in a succeeding chapter.<sup>4</sup>

<sup>1</sup> This custom is said to have been founded on another old custom, which we have referred to further on (*post*, § 30), and which gave to the lord of the manor the right of concubinage with his tenants' wives on their wedding-nights. Under such circumstances it was thought that the youngest son would be more certain to be the child of the tenant.

<sup>2</sup> *Rex v. Jolliffe*, 3 Dow. & Ry. 240; 2 Barn. & Cress. 51; *Davidson v. Moscrop*, 2 East, 56; *Willecock v. Windsor*, 3 Barn. & Adol. 43; *Sheppard v. Hall*, 3 Barn. & Adol. 433; *Freeman v. Phillips*, 4 Mau. & Sel. 486; *Clarkson v. Woodhouse*, 5 Term Rep. 412; 3 Doug. 189; *Regina v. Hale*, 1 Per. & Dav. 233; 9 Ad. & E. 339; *Denn v. Spray*, 1 Term Rep. 466; *Muggleton v. Barnett*, 1 Hurl. & N. 282; 2 Hurl. & N. 653; *Anglesey v. Hatherston*, 10 Mee. & W. 218; *Salisbury v. Gladstone*, 9 H. L. Cas. 692; *Hanmer v. Chance*, 11 Jur. (N. S.) 397; 13 Week. Rep. 356; *Portland v. Hill*, L. R. 2 Eq. 765; 12 Jur. (N. S.) 286; 15 Week. Rep. 38; *Brabant v. Wilson*, 35 L. J. (Q. B.) 49; *Cort v. Birkbeck*, 1 Doug. 218; *Richardson v. Walker*, 4 Dow. & Ry. 498; *Richardson v. Capes*, 4 Dow. & Ry. 512; *Gard v. Callard*, 6 Mau. & Sel. 69.

<sup>3</sup> *Merchant Tailors' Co. v. Truscott*, 11 Exch. 855; *Salter's Co. v. Jay*, 2 Gal. & Dav. 414; *Collyer v. Stennett*, 5 Scott N. R. 34; *Bradlee v. Christ's Hospital*, 5 Scott N. R. 79; *Crosby v. Hetherington*, 5 Scott N. R. 637; *Webb v. Hurrell*, 4 C. B. 287; *Arnold v. Poole*, 4 Man. & G. 860; *Bulbroke v. Goodeve*, 1 W. Black. 569; *Magrath v. Hardy*, 6 Scott 627; *Laybourn v. Crisp*, 4 Mee. & W. 320; *Lyons v. Depass*, 3 Per. & Dav. 177; *Hartop v. Hoare*, 1 Wils. 8; *Blacquiere v. Hawkins*, 1 Doug. 378; *Plummer v. Benthall*, 1 Burr. 248; *Stanton v. Jones*, 2 Selw. N. P. 1225; *Piper v. Chappell*, 14 Mee. & W. 624; *Bruin v. Knott*, 12 Sim. 453.

<sup>4</sup> Mr. Browne (*Usages & Customs*, p. 17) points out an analogy between customs and language. "Language," he says, "is for the expression of human thought, and, in that it is so, it is also a record of the past effort of human intelligence. Custom, which has arisen from human practice, from the factual language of transactions, is not only a record of the past conduct of men, but is at the same time a vehicle for the expression of intention to those who find usage ready to their hand. But there is a close analogy between the two. As language has passed from unity to diversity and variety, so has law passed from a central unity into a scattered and careless variety of custom, so that every place has its particular law of custom. 'Dialects,' says Grimm, 'develop themselves progressively, and the more we look backward in the history of language, the smaller is their number and the less definite their features. All multiplicity arises gradually from an original unity.' Might we not apply almost the same true words to customs—which, in our estimation, bear an exactly similar relation to a system of law that dialects do to a language—that the great German philologist has applied to dialects, and say that customs have developed themselves progressively, and that the unity which we find in the history of jurisprudence has been developed into the variety of customs which we find at the present time. This capability of change in law is not an indication of its inferiority, but of its vitality. So long as men progress, so long as new events happen, new trades arise, new commerce floats upon hitherto unsailed seas, new manufactures change the features of our lives, and new and higher principles take the place of those which governed conduct, regulated acts, and guided life, so long must we expect progressive change and almost lavish variety in our



## The Customs of Merchants.

§ 2. The Customs of Merchants. — Most of the general customs of the common law related to land, and the affairs of an agricultural community, but quick

customs. When a people is dead, — when there are no transactions to be governed, no rights to protect, no interests to regard, — the law may remain unchanged, for the law is dead. We have, indeed, dead laws, just as we have dead languages; and the words of Prof. Max Müller, which are spoken with regard to the life of a language, are equally applicable when applied to a system of laws. 'As soon,' he remarks, 'as a language loses its unbounded capability of change, its carelessness about what it throws away, and its readiness in always supplying instantaneously the wants of the mind and heart, its natural life is changed into a merely artificial existence.' We cannot blame ourselves for this digression if it enables the reader more thoroughly to appreciate the relation which exists between custom and law; if it enables him to understand that customs are, as it were, the feeders of law, and that there is always a slow process of customary regeneration going on, which will be observable to the diligent student of legal history, and which makes up for gradual decay of law which is going on *pari passu*, and which results from the gradual tendency that almost every fixed enactment has to become obsolete. 'I very much doubt,' said Mr. Disraeli, in his speech on the Irish land bill (33 & 34 Vict., c. 46), 'the propriety, as a general principle, of legalizing customs. The moment you legalize a custom you fix its particular character; but the value of a custom is its flexibility, and that it adapts itself to all the circumstances of the moment as of the locality. All these qualities are lost the moment you crystallize a custom into legislation. Customs may not be as wise as laws, but they are always more popular. They array upon their side alike the convictions and the prejudices of men. They are spontaneous. They grow out of man's necessities and inventions; and as circumstances change, and alter, and die off, the custom falls into desuetude and we get rid of it. But if you make it into a law, circumstances alter, but the law remains and becomes part of the obsolete legislation which haunts our statute-book and harasses society.' Hansard's Debates, vol. 193, p. 1806, delivered March 11, 1870. \* \* \* One of the most remarkable instances of the conversion of a custom into a law occurred in connection with the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict., c. 46).

What is most curious in connection with that legislative act is, that it legalized a custom, or a variety of customs, which vary in every county, the real nature of which is only very imperfectly understood. But the fact remains that here has been the recognition of a tangible custom, however multi-form, however various, by law — the confirmation of usage by act of Parliament. As an understanding of the facts connected with the custom of Ulster tenant-right will much facilitate the clear comprehension of the propositions set forth above, it may not be inexpedient to describe shortly the claim or right which was conferred upon the tenant by this custom, which affected the relations of landlord and tenant in Ireland. The Irish Land Act assumes that a custom which bore upon the relations of landlord and tenant prevailed in the province of Ulster, and that it prevailed in forms varying according to local usages. There is, however, no definition of the custom to which the sanction of the law is given. Indeed, men are not agreed as to the nature or extent of the privileges it conferred. As to the character of the custom, Mr. Gladstone, in introducing the bill, said: 'The view we take of it is, that it includes two elements — it includes compensation for improvements and it includes the price of good-will. \* \* \* We do not attempt to modify the custom; we do not inquire into its varieties (it is well known to vary within certain limits); we do not attempt to improve it or qualify it; we leave it to be examined as a matter of fact, and when it shall have been so ascertained, the judge will have nothing to do but to enforce it.' Hansard's Parliamentary Debates, vol. 199, p. 365. The attention of the commission of inquiry into the law and practice in relation to the occupation of land in Ireland, which was issued in 1843, under the presidency of the Earl of Devon, was of course directed to the Ulster custom; but even the report gives no very clear and distinct definition of the nature of the custom. In the preface to Lord Devon's digest, which was published after the report of the commission, there are some sentences which throw a little light on the subject. He says: 'The tenant claims what he calls "tenant-right" in the land, irrespective of any legal claim vested in him, or of any improvement effected by him;' and further on: 'It is difficult to deny that the effect of the system is a

## Definitions.

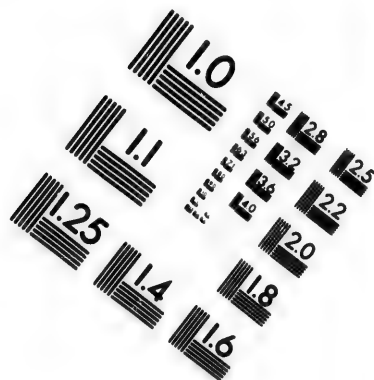
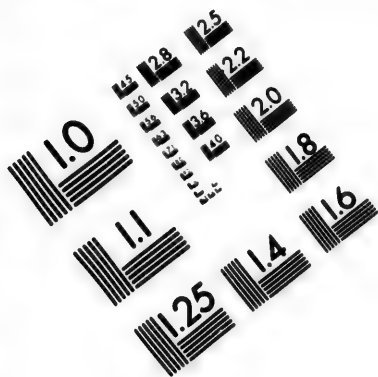
upon the heels of commerce came what Blackstone has denominated the "customs of merchants;"<sup>1</sup> that is to say, those rules relative to bills of exchange, partnership, and other commercial transactions, which convenience had suggested and experience had adopted and made general. Those customs which were seen to be universally and notoriously prevalent among merchants, and

practical assumption by the tenant of a joint proprietorship in the land, although those landlords who acquiesce in it do not acknowledge to themselves this broad fact, and that the tendency is gradually to convert the proprietor into a mere rent-charger, having an indefinite and declining annuity, or the lord of a copyhold. \* \* \* It is, in the great majority of cases, not a reimbursement for outlay incurred or improvements effected on the land, but a mere life-assurance or immunity from outrage. Hence the practice is more accurately and significantly termed "selling the good-will." Here, then, it is evident that the Ulster tenant-right originated in an equity arising to the incoming tenant from the sanction given by the landlord to his purchase of his farm. A fair and just man could scarcely deprive him of the right of realizing the sum which had been paid with his sanction, and hence arose the obligation to permit him to sell again; and in this obligation, enforced by public opinion, carried out in public practice, consisted the whole custom of Ulster tenant-right. In Mr. O'Connell's report upon the effect of the evidence given before the commission, the description of the custom is as follows: 'That, according to the practice of this right, no person can get into the occupation of a farm without paying the previous occupier the price of his right of occupation, or good-will, whether the land be held by lease or at will; that, on the ejectment of any occupying-tenant, he reserves the full selling-value of his tenant-right, less by any arrears due to the landlord; that the same custom, unrecognized as it is by law, prevents the lord who has bought the tenant-right, or otherwise got into possession of a farm, from setting it at such an increase of rent as to displace tenant-right. Thus, middle-men are almost unknown, and the effect of competition for land is principally to increase the value of the tenant-right, not the amount of the rent. That tenant-right exists even in unimproved land, and that five years' purchase is an ordinary payment for the tenant-right of such land, while fifteen or twenty years' purchase is often given for the tenant-right of highly improved farms.' The effect of the evidence

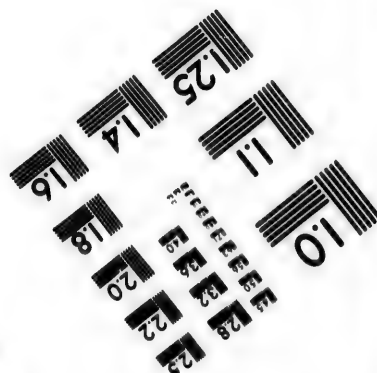
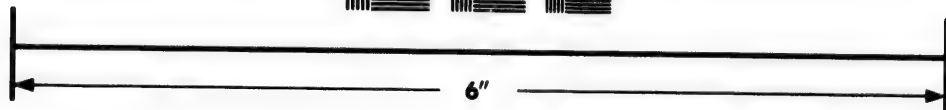
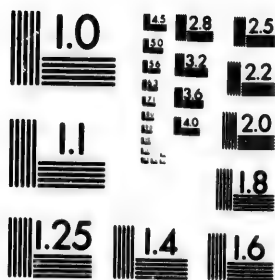
of Mr. Senior, who at one time filled the office of assistant poor-law commissioner, before the townland valuation committee, in 1844, was to the effect that Ulster tenant-right entitled the tenant to the difference between the actual rent of his farm and the competition price which could be obtained for it, and that it did not matter whether the difference could be referred to improvements effected by the tenant and his predecessor in title, or to the fact that the farm was held originally at a low rent. He regarded it as an essential ingredient of the custom that the rent should not be raised on the incoming tenant, but suggested that the real difficulty in understanding the custom was to determine why the landlord did not increase the rent. Here, then, we have a most curious custom, which seems to have imposed restrictions upon the legal right of the landlord to raise his rents. And we see that that custom has by an act of the legislature become law; that this custom may have resulted from the fact that land increases in value without the interposition of landlord or of tenant, — an increase which some political economists have suggested should be appropriated to the use of the State, but which has in practice been found so inseparable and indistinguishable from the increased value which has resulted from improvements, which were by consent allowed to belong to the tenant, that they have not been distinguished in proprietorship, — and hence the institution, it seems to us, of tenant-right and the gradual limitation of the landlord's ownership. So much for this curious experiment, which possesses much interest to the student of the science of jurisprudence. We see here the transformation of custom into statute law. The usual course has been to find custom creeping into the common law through the decisions of the courts; and it may be useful to consider in this place, as preliminary to the main purpose of this work, that branch of the common law which goes by the name of 'customs,' the thorough understanding of which cannot fail to throw light upon the law of usage."

Browne on Usages & Customs, pp. 2-3.

<sup>1</sup> 1 Bla. Comm. 75.



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 Local Customs of Trade.
 

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which had been found by experience to be of public benefit, were soon adopted by the law-merchant, and became a part of the general law of England.<sup>1</sup> Once recognized by a judicial decision, it was not necessary to prove it or to leave it to a jury in subsequent cases. "People," said Mr. Justice FOSTER, in an old case,<sup>2</sup> "talk of the custom of merchants. This word 'custom' is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of England, and therefore Lord COKE calls it very properly the law-merchant. We should not confound general customs with special local customs." While these customs were in course of recognition by the courts, it was the practice of the judges to confer on points of mercantile law with persons conversant with the trade. Thus, Lord Chancellor HARDWICKE adopted this course in *Kruger v. Wilcox*<sup>3</sup> and his example was followed by Lord MANSFIELD in a subsequent case, in which an important question had arisen upon a policy of marine insurance. A general custom of merchants, when it is ascertained and established, becomes then a part of the law-merchant, which courts of justice are, as said by Lord CAMPBELL in *Brandao v. Barnett*,<sup>4</sup> "bound to know and to recognize." Such has been the inveterate understanding and practice in Westminster Hall for a great many years; there is no decision or *dictum* to the contrary; and justice could not be administered if evidence were required to be given *toties quoties* to support such usage, and issue might be joined upon them in each particular case." So far, then, it is correctly said,<sup>5</sup> as the usages of merchants have been judicially ascertained and established, so far as they have become the acknowledged law of the land, they have ceased to deserve the name of custom, just as much as any other common-law rule which had its foundation in the customs of the country. It is a part of that common law, and is, therefore, not within the scope of this book.

§ 3. Local Customs of Trade.—But to the local customs of trade—the usages of particular markets or particular ports—the larger part of this volume will be devoted; and the importance of the inquiry may be seen in the frequency with which cases involving the discussion of the admissibility of parol evidence of custom or usage to affect the rights of parties as measured by the general rules of law, or to vary, add incidents to, or explain the meaning of written contracts, have come before the English and American courts within recent years.

§ 4. Contradictory Decisions—Dislike of the Judges to extend the Office of a Usage.—The conclusions arrived at in many of the cases are divergent and contradictory, especially in those where the evidence of custom has been offered for the purpose of explaining written contracts. This has mainly arisen from a noticeable vacillation in the minds of some of the judges as to the extent to which usages should be admitted in this connection. In an early case, Lord

<sup>1</sup> *Brandao v. Barnett*, 12 Cl. & Fin. 805; *Hussey v. Jacob*, 14. Raym. 88; *Stone v. Rawlinson*, Willes, 561; *Benson v. Chapman*, 8 C. B. 967, note; *Cookendorfer v. Preston*, 4 How. 317; *Magill v. Brown*, Bright. 346; *Lickbarrow v. Mason*, 2 Term Rep. 73.

<sup>2</sup> *Edie v. East India Co.*, 1 W. Black. 250; 2 Burr. 1216.

<sup>3</sup> Amb. 252.

<sup>4</sup> *Vallejo v. Wheeler*, 1 Cowp. 143.

<sup>5</sup> 12 Cl. & Fin. 805.

<sup>6</sup> *Browne on Usages & Customs*, 13.

## Views of the Judges.

ELDON expressed a decided opinion that the practice of admitting usage to explain contracts ought not to be extended; but, as we shall see when we come to examine the subject more particularly,<sup>1</sup> the tendency of the English courts is now decidedly the other way. In the earlier cases, many other English judges manifested grave doubts as to the expediency of the extension of the rule admitting evidence of usage. Thus, in *Hutton v. Warren*,<sup>2</sup> the court, although deciding in accordance with the authorities, clearly indicated that in their opinion the relaxation of the common law in reference to this matter, where formal agreements had been entered into, and especially instruments under seal, was both unwise and unjust. In *Freeman v. Loder*,<sup>3</sup> Lord DENMAN, C. J., said: "If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions: that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written documents. Again: what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom of trade, as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and, supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom." Many American judges have expressed their dislike of this species of evidence. Thus, in 1837, Mr. Justice STORY said: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs, in almost all kinds of business or trades, to control, vary, or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them."<sup>4</sup> And in *Donnell v. Columbian Insurance Company*,<sup>5</sup> he said: "I am among those judges who think usages among merchants should be very sparingly adopted as rules of court by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles." "Miserable will be our

<sup>1</sup> *Post*, Chap. IV.<sup>2</sup> 1 Mee. & W. 475.<sup>3</sup> 11 Ad. & E. 597.<sup>4</sup> *The Reeside*, 2 Sumn. 567 (approved in *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137).<sup>5</sup> 2 Sumn. 307.

## Views of the Judges.

condition," said Chief Justice TILGHMAN, in *Stoever v. Whitman*,<sup>1</sup> "if property is to depend, not on the contract of the parties, expounded by established principles of law, but on what is called the custom of particular places; so that we may have different law in every town and village in the Commonwealth." In *Bolton v. Colder*,<sup>2</sup> GIBSON, C. J., said: "Nothing should be more pertinaciously resisted than these attempts to transfer the functions of the judge from the bench to the witness-stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights. If the existence of a law be so obscure as to be known to the constitutional expositors of it only through the evidence of witnesses, it is no extravagant assumption to take for granted that the party to be affected was ignorant of it at the time when the knowledge of it would have been most material to him; and to try a man's actions by a rule with which he had not an opportunity to become acquainted beforehand is the very worst species of tyranny." In *Cox v. O'Riley*,<sup>3</sup> PERKINS, J., said: "Were the courts by their decisions to encourage the growth of these local usages, originating generally in lax business practice or mistaken ideas of law, they might become as great an evil, a source of as much want of uniformity in the law, as was the local legislation of the past — an evil supposed to be eradicated from our political system by the new Constitution." In *Harper v. Pound*,<sup>4</sup> STUART, J., said: "To permit the temporary or indolent usages of each locality to control contracts would be to make contracts conceived in the same language, and relating to the same subject-matter, one thing in one place and another in another. A contract for 'clearing' land might thus be made to mean one thing in Posey County and quite another in Steuben or Lake. In one locality the word 'clearing' might mean to take out the stumps; in another, to clear off everything but the stumps; and in another, to clear off such timber as was eighteen inches and under. And the same contract, in precisely the same words, would mean each of these things in the respective localities. This would create a body of local laws far more intricate and embarrassing in judicial investigations than the local statutes with which the State was formerly inundated. The recognition of these local usages is, as a general rule, contrary to the public policy of this State. Our Constitution and judicial decisions are hostile to local legislation and local customs. The policy of the State is to have all her localities a unit: the same law and the same rule of decision prevailing everywhere throughout the State." In *Strong v. Grand Trunk Railway Company*,<sup>5</sup> COOLEY, C. J., said: "Special customs are so liable to create confusion of legal rules in directions not contemplated in their adoption, that they are admitted into the law with great reluctance; and it is not often a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit to do so." In *Dykens v. Allen*,<sup>6</sup> Senator WRIGHT said: "To allow the usages of Wall Street to control the general law in relation to any matter might result in the establishment of principles not always in accordance with sound morals. I prefer that legal principles should have a universal application, and that con-

<sup>1</sup> 6 Binn. 417.<sup>2</sup> 1 Watts, 360 (1833).<sup>3</sup> 4 Ind. 393.<sup>4</sup> 10 Ind. 32.<sup>5</sup> 15 Mich. 206.<sup>6</sup> 7 Hill, 497.



## Conflicting Views.

tracts should receive the same interpretation in the thronged and busy mart of a commercial metropolis that they do elsewhere." In *Partridge v. Insurance Company*,<sup>1</sup> Mr. Justice MILLER said: "The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing these rules as usage or custom, with the force of law." In *Barlow v. Lambert*,<sup>2</sup> STONE, J., after citing with approval the language of Mr. Justice STORY in the case of *The Reeside*, added: "The Constitution, in the distribution of the powers of the government, having conferred the legislative power on the General Assembly, the question may arise, Under what authority, by what warrant, are we brought under the dominion of other rules of action? Is it sound, is it consistent with our government, that any portion of the community less than the whole—any city, town, village, or neighborhood—shall exercise powers which the Constitution has conferred alone on the General Assembly? Shall such portion of the community make unto themselves a law which shall overrule the general law? It becomes us to feel our way cautiously, lest there grow up in our midst some third estate which shall in time usurp the government."<sup>3</sup>

§ 5. Different Views entertained by other Judges. — But other judges and courts have thought differently. "We know," said the Supreme Court of Vermont, in *Chapman v. Devereux*,<sup>4</sup> "that usage and custom will accomplish everything except impossibilities." "Usages," said HUBBARD, J., in *Macy v. Whaling Insurance Company*,<sup>5</sup> "become laws by their frequent repetition, their reasonableness, their adaptation to promote the interests of the parties engaged in the business to which they are applied, and by their common adoption in the community among those interested. They are the results of the sound common sense of practical minds engaged in the same business: each party, whether buyer or seller, giver or receiver, having his own as well as the common advantage in view." In *Ellis v. Ohio Life Insurance Company*,<sup>6</sup> RANNEY, J., said: "No court has been more reluctant than this to allow local customs to interfere with the general principles of law; but to a certain extent, and within certain limits, it becomes absolutely necessary to enforce them or to disregard the implied conditions and understandings upon which parties have dealt. To allow them to operate against third persons who cannot be shown to have had any knowledge of their existence is one thing, and to hold the immediate parties to the controversy bound by a course of business upon which they have uniformly acted, or

<sup>1</sup> 15 Wall. 573.

<sup>2</sup> 28 Ala. 704.

<sup>3</sup> In a Virginia case it is said that, as the Constitution vests the whole law-making power in the Legislature, it is difficult to see how a few individuals can make a law by custom which is to bind all. Why should the people be forced to submit to a law which has never been assented to by them through their proper representatives? And even were the Legislature to expressly de-

clare that custom might make law, would not this be an unauthorized delegation of power? Would not such a law be void for want of power in the Legislature to delegate to a few men the right to make a law by getting up a custom? *Delaplane v. Crenshaw*, 15 Gratt. 457.

<sup>4</sup> 32 Vt. 616.

<sup>5</sup> 9 Mete. 354.

<sup>6</sup> 4 Ohio St. 628.



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Contradictory Views.

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one embarked in a particular business at a place where it has been found necessary to its safe or convenient prosecution that a general custom should be observed, under obligations to conform to it, is quite another. Every one engaged in a business undertakes to bring to it a competent knowledge of its rules and principles, and those who deal with him have a right to rely upon his having regarded them." In *Clark v. Boker*,<sup>1</sup> DEWEY, J., said: "The extent to which local usages of trade are to be applied in the construction and effect to be given to contracts, is a matter by no means free from difficulty. These usages differ essentially from those more general customs which are known and exist as part of the general law of the land, and which are observed and applied without being established by evidence offered in each particular case. These local usages may be of comparatively recent origin, and may be limited to a single city or village; and yet, if reasonable in their provisions, and so generally adopted by those concerned in any peculiar branch of business as to authorize the presumption that they are known by those who are dealing as vendors and vendees in that branch of trade or business, the dealings and contracts of such persons are considered to have been made in reference to such usages and to be governed thereby. Learned jurists have often expressed their regret at the extension of this species of evidence, and especially that as to usage of a local and limited character, as impairing in some degree the symmetry of the law, and tending to uncertainty and embarrassment in the administration of justice; and also liable to the serious objection that the knowledge by the party to be affected by it, of the existence of such usage, is a mere legal presumption which may often be unfounded in reality, although such usage is established by what is deemed competent legal evidence. Notwithstanding these objections, such local usages have been held admissible by the judicial tribunals as competent to explain and qualify the contract, and give to it an effect materially different from that which the general law would have done in the absence of all evidence of such usage." In *Wilcocks v. Phillips*,<sup>2</sup> BALDWIN, J., said of usage: "Its influence is universal. It attaches to nations and to individuals. It creates obligations. It interprets laws. General custom is a general law, and forms the law of contracts; and this, sometimes, though it be at variance with their terms. It controls even the principles of law. Thus, the right to the waygoing crops, days of grace, and time of protest are regulated by the usage of the place or bank, and affect even those who have no notice of the custom. The ancient, established, uniform, and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade are understood to consent. It makes, supplies, and construes their contracts. Known and settled usage ought to be respected by courts and juries, unless such usages are against the laws or policy of the country; otherwise our dealings with foreigners in foreign lands will fall into disorder and confusion." Speaking of the effect of usages and customs on the law of common carriers, THOMPSON, C. J., said: "Every day the old rule is being gradually modified by contract, usage, or notice, to fit it to the new order of business in that line. Indeed, the whole system of the law of common carriers grew out of customs, moulded into form and made practical by the courts in England; and hence for a long time, when

<sup>1</sup> 11 Metc. 188.<sup>2</sup> 1 Wall. Jr. 63.

## Opinions favoring their Admission.

suits were brought against persons engaged in the carriage of goods and merchandise, the action was called an action upon the custom of the realm. In modern times the practice is to sue upon the contract. It would be strange if the process of improvement by custom and usage is to stop just here and go no further. I regard it as a matter not debatable at this day, that a custom so long persisted in as to be known and practised by a community shall not become the law of the particular business in which it exists in the community, from which a presumption will arise that it is in the view of the parties who contract about the subject-matter of it, and depend that it will be the interpreter of their contracts whenever they leave room for a resort to it. In other words, when the express terms of the contract do not exclude it, usages of this kind in trade, which have a like effect when clearly established, are generally found in practice to exhibit a superior adaptedness to the convenience and wants of the community to those which are superseded by them, and in this way development and progress result. It is hardly necessary to say that all usages that become customs must be reasonable; but it is not likely, in modern times, that anything else would be suffered to grow into a custom; nor that it must be continued, for otherwise it would never become a custom; still, both these elements are requisites, and also that they be generally acquiesced in by all acting within the scope of their operations."<sup>1</sup> And Lord CAMPBELL, in the leading case of *Humfrey v. Dale*,<sup>2</sup> has pointed out that, however much the courts may shrink from giving to the usages of trade their place in the law, they cannot well refuse to recognize them without injury to those among whom they exist. "Lawyers," he says, "desire certainty, and would have a contract express all its terms, and desire that no parol evidence beyond it should be receivable. But merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle and meeting each other, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of judges they will continue to do so, and in a vast majority of cases, of which courts of law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous, even at the risk of occasional litigation." The later English cases show that, in more recent times than those to which Mr. Justice STORY referred, there has been a tendency on the part of the English judges to extend the office of a usage, and to supply words and incidents in a written contract which are not inconsistent with it. Looking to the intention of the parties as the primary object, they have come to the conclusion that this intention is better ascertained by a careful regard to the circumstances of the parties at the time of the contract than by a slavish adherence to the written words of the instrument.<sup>3</sup> Consequently the functions of customs have, in England, been much extended of late years; and leaving out of view the older cases where evidence of usage was rejected,<sup>4</sup> as at least impliedly overruled by recent adjudications, the English cases are easily reconcilable. In America, however, this is unfortunately not the case. The decisions in this country, even of late years, present no uniformity, but are liberal or strict in admitting evidence of usage, according as the judges concluded to follow the earlier or the later English precedents.

<sup>1</sup> *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

<sup>2</sup> 7 El. & Bl. 266; *post*, Chap. IV.

<sup>3</sup> *Browne on Usages & Customs*; *post*, Chap. IV., notes to *Humfrey v. Dale*.

<sup>4</sup> As *Greaves v. Ashlin*, 3 Camp. 426.

### The different Kinds of Usages and Customs.

§ 6. **The different Kinds of Usages and Customs.**—We have now seen that common-law customs are of two kinds—general and particular; that the former are a part of the common law, and that the latter must be proved by witnesses, unless required by statute to be judicially noticed by the courts. We have seen, likewise, that the customs of merchants are both general and local, and that the former are a part of the common law, while the latter must be proved by evidence. One branch of our subject alone remains, viz.: the usage of a particular person. Laying aside the general common-law customs and the general customs of merchants, we divide the usages and customs of this treatise into three branches, viz.: (1) particular customs, or the usages of particular places; (2) usages of trade, or the customs of particular trades or occupations; and (3) customs of particular persons. Though the latter word has strictly a different signification, “usage” and “custom” have come to be used as synonymous and convertible terms, and will be so used in these pages.<sup>1</sup>

I. A particular custom is a custom which affects only the inhabitants of a particular place.

II. A usage of trade is a uniform practice applied to modes and courses of dealing in a certain business or occupation.

III. A custom of a particular person is the habit of an individual.<sup>2</sup>

In the following pages we shall endeavor to state the law applicable to usages and customs, the rules of evidence which will enable the practitioner to prove them in given cases, the rules of law which will enable him to determine their legality when their existence is established, and the principles which will enable him to place upon them the correct legal construction.

§ 7. **A Common-Law Custom must be ancient.**—A common-law custom must have existed so long that the memory of man runneth not to the contrary.<sup>3</sup> If a usage could be shown to have commenced, it was void as a custom. Every custom, of course, must have had a commencement, but if its inception could be discovered, then the individual by whose particular will the custom had its birth would be discovered; and it was a maxim that no one man could be allowed to make a law, but that a custom could only have its origin in the will of the whole. The time “whereof the memory of man runneth not to the contrary” received a technical limitation, and was understood to refer to the commencement of the reign of King Richard I.<sup>4</sup>

<sup>1</sup> See, in support of this, *Walls v. Bailey*, 49 N. Y. 461; *Dickinson v. Gay*, 7 Allen, 32; *Jewell v. Railway Co.*, 55 N. H. 84.

<sup>2</sup> *Post*, § 46.

<sup>3</sup> A custom must have been time out of mind; for if any one can show where it began, it is not a good custom. 1 Dane's Abr., chap. 26, art. 1; *Rex v. Johns*, Lofft, 76; *Rex v. Jolliffe*, 2 Barn. & Cress. 54; *Jenkins v. Harvey*, 1 Crompt. M. & R. 877; *Simpson v. Wells*, L. R. 7 Q. B. 214; *Duke of Beaufort v. Smith*, 4 Exch. 450; *Master Pilots, etc.*, v. *Bradley*, 2 El. & Bl. 428; *Bailey v. Appleyard*, 3 Nev. & P. 257; *Seales v. Key*, 11 Ad. & E. 819; *Welcome v. Upton*, 5 Moo. & W. 398.

<sup>4</sup> The origin and history of legal memory is described in a note to the case of *Cassidy v. Stewart*, 2 Man. & G. 437, thus: “At common law, a person suing for a freehold was bound to show that he or his ancestor had been in possession within the time of memory; that is, within the memory of a person living, or of his father, who, if not present at the actual feoffment or investiture of the party disseized, had seen him in the peaceable seisin of the land, and acting as one of the *partes* of the lord's court—the rule of law formerly being that no man could prove any matter unless it had been seen by himself or by his father, who had enjoined him to testify the fact. *Brac.*, lib. 5, c. 5, § 3, fol. 373 a, 2

## This Rule not applicable in America.

Although in a few American cases<sup>1</sup> it has been loosely laid down that one of the essential elements of a valid custom or usage in the United States is that it should be "ancient," it is obvious that the English rule could never have any application here. As the "time whereof the memory of man runneth not to the contrary" is defined, as we have seen, to mean the beginning of the reign of Richard I., this is sufficient to stop all inquiry into American common-law customs, for the excellent reason that this country was not discovered until several hundred years later.<sup>2</sup>

Inst. 94. It being found inconvenient to leave the rights of parties dependent on the longevity of witnesses, it was thought desirable to remove this uncertainty without materially enlarging or abridging such rights. The first fixed epoch appears to have been the accession of Henry I. (on the 1st of August, 1100). So matters continued until 1235, when it was thought that a period of one hundred and thirty-five years was an unreasonable substitution for the reach of human memory, occasionally prolonged by the injunction above referred to—from its nature, of too rare occurrence materially to affect the period of limitation. By the Statute of Merton (1235), c. 6, an epoch more nearly approaching the actual duration of human remembrance was introduced, viz., the coronation of Henry II., which had taken place eighty-one years before, namely, on the 20th of October, 1154. In 1235 the eighty-one years had swollen to one hundred and twenty-one years; which, being considered an absurdity, a new epoch was introduced, viz., the time of Richard I.—i.e., his coronation in 1189, being eighty-six years before. This continued unaltered until 1510, when the more convenient rule of sixty years before action brought was introduced. During the whole interval between 1275 and 1510, the coronation of Richard I., in 1189, was the period of legal memory in respect to writs of right, shorter periods being adopted with respect to the limitation of possessory actions. From the very frequent recurrence of this as the longest period of limitation, in the discussion which took place daily in this court (Court of Common Pleas) in respect of real actions, it was thought convenient by the judges that in all cases of customary or prescriptive rights depending upon the memory of man the same epoch should be resorted to. And this usage, resting solely upon an arbitrary introduction of a rule of analogy resting upon the statute of Edward I. in 1275, had become so inveterate before 1510 that when the statute of 1275 was repealed, in 1540, a rule which had no other foundation than the repealed statute was

tacitly allowed to remain, and it has continued down to our own times. *Vide* 2 & 3 Wm. IV., c. 71." Co. Lit. 115 a; Browne on Usages & Customs, 15. If all evidence of the commencement of a custom was wanting, proof that it had been practised for a long time, and that it had been observed as far back as the memory could reach, amounted to presumptive proof that it prevailed during the whole period of legal memory. *Ibid.*; Leuckart v. Cooper, 7 Car. & P. 119; Scales v. Key, 11 Ad. & E. 819. The English law requiring proof of the immemoriality of a custom has been considerably modified by the statute 2 & 3 Wm. IV., c. 71, which provides, as to customary and presumptive claims of rights to be exercised over the land of other persons (such as the rights of common, or way, or use of light), that they shall be considered as sufficiently established by an uninterrupted enjoyment as of right in some cases for thirty, in others for twenty years, and shall not be defeated where such enjoyment can be proved by showing that they commenced within the time of legal memory. Shelf. Real Prop. Stats. (7th ed.) 2, 6; Hammer v. Chance, 11 Jur. (N. S.) 397; Shuttleworth v. Le Fleming, 19 C. B. (N. S.) 687. And see notes to Cassidy v. Stewart, 2 Man. & G. 437.

<sup>1</sup> As in *Shaw v. Ferguson*, 11 Cent. L. J. 106.

<sup>2</sup> See *Ackerman v. Shelp*, 8 N. J. L. 125; *Allen v. Stevens*, 29 N. J. L. 503; *Stevens v. Paterson*, etc., R. Co., 34 N. J. L. 532. But see *Rust v. Low*, 6 Mass. 90. It is held in Virginia that a custom in opposition to the common law, however general it may be, has no force in that state, because it must necessarily lack the necessary element of antiquity. Therefore the Supreme Court of that State, in 1836, refused to consider a custom that the outgoing tenant should have the waygoing crop, as was held in England in *Wigglesworth v. Dallison*, *post*, Chap. III. Particular customs, they said, were valid in England, preventing the application of the common law to the county or district in which the custom prevails by showing that the common law as to the subject never had any existence there. ▲

## A Usage of Trade must be "Established."

§ 8. But a particular Custom or Usage of Trade is valid if "established."—But, as was laid down by Chief Justice BEST in *Sewell v. Corp.*,<sup>1</sup> the element of

custom, to be valid, must be as old as the common law; but if the particular custom was proved to be immemorial, it necessarily excluded the general custom or common law, because the two, being inconsistent, could not stand together. But the settlers of this country and State brought with them the common law or general customs of England, but none of the particular customs. The common law thus became the law of the State, and any custom introduced since its settlement, in opposition to the common law, can have no force, since it lacks the essential ingredient of a good custom—it is not immemorial. It could not have existed until after the settlement of the country, and after the common law had attached to every part of it. And as a recent usage it could not change the common law. *Harris v. Carson*, 7 Leigh, 632. This argument was approved in a more recent case in that State (*Delaplane v. Crenshaw*, 15 Gratt. 457), in which it was said (*per Lee, J.*): "This opinion, concurred in by all four of the court who were present, would seem to be conclusive upon the question in this case. Nor do I feel at all prepared to advance a different one. That a custom to displace the common law must be immemorial, and that the time of memory runs back to the reign of Richard Cœur de Lion, are maxims of such ancient, universal, and familiar acceptance in the English law that it is now quite too late to controvert their correctness. And although this period was that fixed for the limitation of the writ of right by the Statute of Westminster 1st, which was afterwards reduced to sixty years by the statute of 32 Hen. VIII., c. 2, I am aware of no change made in the mode of estimating the period during which, to be good, a custom must be said to have continued. It is true that it has been made the subject of regret and complaint that the time of legal memory was not shortened by the courts of law, upon the same reason which led to the reduction of the period of limitation, yet that it remained unchanged is everywhere conceded. See Best on Presump. 187; *Oru. Dig.*, tit. 31, chap. 1; 2 Greenl. on Ev., § 538; *Coolidge v. Learned*, 8 Pick. 504. I am aware that cases are to be found in which regular usage short of the prescribed period has been held to be sufficient evidence of the

custom alleged, and, where uncontradicted or unexplained, deemed sufficient to authorize a jury to find the existence of an immemorial custom. But they do not contradict the general rule, as they will be found to depend upon the artificial doctrine of presumptions, which has been introduced in part, or at least taken advantage of, to evade the rule of legal memory and remedy the inconvenience attributed to the omission of the courts to shorten the period by analogy to the reduction of that of the limitation of the writ of right. But this doctrine cannot be applied to a subject like this. It may not be confined to incorporeal hereditaments, but may extend to real estate also; but this falls within neither description; and the presumption of a grant is not a rule of law, but is to be the basis of a finding as to a fact by a jury. Moreover, it can only be made where the thing lies in grant, and where there is a party by whom the grant could be made, as well as one to receive it. Such a right as this could not be the subject of a grant; nor is there any one who could be supposed to have made it, nor any one who could be supposed to have accepted it. The millers of the present day cannot be bound by the concessions of those of former years, because in no legal sense can the latter occupy the relation of ancestors or predecessors to them; nor can the inspector of this day claim to have derived any such right by succession. His rights grow out of the statute, and not of any relation in which he can be supposed to stand to those who may have happened to precede him in the office. In reference to those cases in which a jury has been advised to presume a usage to have been immemorial from proof of its continuance for a shorter period than that of legal memory, it must be observed that this was where the usage was uncontradicted and unexplained, and its origin not shown to have been within the prescribed period. This, however, may always be done, and the presumption that the custom was immemorial thus repelled. Nor is it necessary that its origin, or a time when it did not exist, must be shown by the memory of some living witness; for the 'memory of man' which is spoken of is not to be understood as merely living memory, but memory by the means of records or other written me-

<sup>1</sup> 1 Car. & P. 392 (1824), *ante*, p. 2.

## Usages of Trade Valid if Established.

antiquity need not attach to a usage of trade. Thirteen years later, Serjeant STEPHEN called time a pillar of a common-law custom, but admitted that age was not essential to a usage of trade.<sup>1</sup> Even as early as 1780, in the frequently cited case of *Noble v. Kenworthy*,<sup>2</sup> Lord MANSFIELD said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year." And on the construction of a marine policy in the trade to Labrador, which was first opened to English shipping after the Peace of Paris, and had been carried on but three years, he held that a custom which had been invariably observed ever since its opening was as binding on those who shipped on Labrador risks as though the trade itself had been of much longer continuance. To the same effect are the American adjudications. In an early Maine case, the court refer to a usage of trade in these words: "The counsel for the defendant treated this usage among printers and booksellers as a custom, such as we find described in our law-books, and have contended that, to be valid, it must have existed for time immemorial, uninterrupted, definite, reasonable, etc. We apprehend that the law of local customs is not applicable in this case. The usage relied on has nothing local in its nature; it relates to a certain class of people spread through the country, and to the peculiar business in which they are employed."<sup>3</sup> But while a usage of trade or business need not be "ancient," as that word is used in the books, it is nevertheless required that it shall be fully established as a usage of trade or business. And time, it is plain, is one ingredient, at least, necessary to accomplish this. What length of time shall be sufficient can, of course, not be stated in the form of a general rule, but each case must depend upon the various relations of the trade to the public, the exigencies of the business, and the frequency of the repetition of the particular usage in the time within which it may be proved to have existed. Thus, three weeks in the city of New York, where a great number of transactions of the same character take place daily, was considered by SLOSSON, J., a sufficient length of time to establish a usage in the in-

morials. And, therefore, where there is any proof of the original or commencement of anything, it cannot be claimed by prescription unless it were before the commencement of the reign of Richard I. Co. Lit. 113; *Id.* 115 a; 3 Stark. on Ev. 1204; Bull. N. P. 248. The origin of the usage in this case, though not in the memory of living men, is shown by the dates of the acts establishing inspections, beyond the earliest of which, of course, the usage could not have existed. I have not thought it necessary to enter into the inquiry as to the origin of the custom of merchants, or into those respecting the origin of the jurisdiction of the Court of Chancery or of the King's Bench in other than criminal cases, or of the Courts of Exchequer and Common Pleas; nor shall I stop to consider the custom to bar entails by surrender in the Lords' Court without a recovery, all of which subjects have been so earnestly discussed by the counsel. Time

and space would fail me were I to undertake to enter upon the task. I must content myself with saying that I think these inquiries would not shed much light upon the subject of discussion here, depending, as I think it does, upon a few intelligible legal principles. Neither can I stop to examine the various cases cited from the reports of our sister States and some of the courts of the United States to establish a doctrine different from that of our own court. It is sufficient for my purpose that this court has, by the unanimous opinion of all the four judges sitting, disaffirmed the existence of any customary law in Virginia in a case in which the alleged custom would have been, and in fact had been, held good in England, and that, upon general principles, I think that conclusion sound and correct."

<sup>1</sup> Gould v. Oliver, 4 Bing. N. C. 134.

<sup>2</sup> 1 Doug. 510.

<sup>3</sup> Williams v. Gilman, 3 Me. 276.



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**A Custom must be Certain.**

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insurance business restricting the ordinary signification of the word "storehouse," as used in a fire policy;<sup>1</sup> while five years in an Alabama county, in the year 1852, was thought by the court to be too short a time to establish a usage in the carrying trade contrary to the ordinary rules of law.<sup>2</sup> In *Adams v. Otterback*,<sup>3</sup> a certain banking practice had been in force at a particular bank but two years, and only four cases had occurred under it. This was held to be insufficient to establish a usage. "To give it the force of law," said Mr. Justice McLEAN, "it requires an acquiescence and a notoriety from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank." In *Buford v. Tucker*,<sup>4</sup> in a suit on a promissory note for a certain number of dollars, made in January, 1865, evidence was offered and rejected that there was at the place, and in the county generally, where said note was given, a general and notorious custom that where the word "dollars" was employed in a contract, and nothing was said as to the kind of dollars, the agreement was to pay in Confederate money. "We know historically," said the Supreme Court of Alabama, in affirming the ruling, "that Confederate currency (treasury-notes) was first issued about the year 1862, and, therefore, the alleged custom wanted nearly all the necessary requisites of a good custom. It certainly wanted antiquity, and it must also have wanted certainty, consent, obligation, and the other elements of a good custom." Where a custom of millers at Indianapolis was set up, that when they received wheat, it was at the risk of the seller until he called for his pay, the court said: "It is very difficult to see how such a custom could be proved. It could not be proved by showing that it was the custom of millers to make such a stipulation a part of the contract, because that would make the question of liability one, not of custom, but of special contract. Such a custom could only be proved by showing that the Indianapolis millers had long been in the habit of thus receiving wheat, and losing it or having it destroyed, and that the sellers did not claim pay for it in such cases; in short, that losses of wheat by millers, and exemption from liability to pay for it, had been so frequent and for so long a time as to have become the law of the place."<sup>5</sup> A habit of a carrier, for a month past, to deposit goods in a certain place does not establish a custom binding on parties not having knowledge of it.<sup>6</sup>

Therefore, the rule that a usage must be established means simply that it must have existed a sufficient length of time to have become generally known.<sup>7</sup>

**§ 9. A Common-Law Custom must be certain.** — A common-law custom was

<sup>1</sup> *Wall v. East River Ins. Co.*, 3 Duer, 264.

<sup>2</sup> *Cooper v. Perry*, 21 Ga. 526. And see *Smith v. Rice*, 56 Ala. 417.

<sup>3</sup> 15 How. 539.

<sup>4</sup> 44 Ala. 89.

<sup>5</sup> *Carlisle v. Wallace*, 12 Ind. 252.

<sup>6</sup> *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

<sup>7</sup> *Smith v. Wright*, 1 Caines, 45; *Trott v. Wood*, 1 Gall. 44; *Mears v. Waples*, 3 Houst. 581; *Clark v. Gifford*, 7 La. 524; *Hall v. Storrs*, 7 Wis. 253; *Newbold v. Wright*, 4 Rawle, 195; *Wilson v. Bauman*, 80 Ill. 493; *Juggomohua Ghore v. Manickchand*, 7 Moo. Ind.

App. 263; *Legh v. Hewitt*, 4 East, 154. The usage of a corporation in conflict with its chartered powers need not be ancient. *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, *post*, Chap. III. "In order to constitute such a custom, or, more properly speaking, such a usage as is binding upon a tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage applicable to farms of a particular description." *Taylor's L. & T.*, § 510 (citing, *inter alia*, *Thorpe v. Eyre*, 3 Nev. & M. 214; *Wilkins v. Wood*, 17 L. J. (Q. B.) 319).

## Illustrations.

required to be certain and uniform, both as to the persons claiming under it and the things claimed.<sup>1</sup> "This is an element," says Mr. BROWNE,<sup>2</sup> "which must necessarily and by force of reason attach to a custom. Any miscellaneous observances which have no coherence of principle are necessarily inefficacious as forming a rule of conduct. It is only when observances have shaped themselves into a constant uniformity, only when their characteristics of the past can be a clear light for their incidents in the future, that they rise to the level of a custom, which is the stuff of which law is made." Therefore, since before BLACKSTONE'S time a custom that land shall descend to the most worthy of the owner's blood was void, on the ground that the custom gives no certain means for the discovery of merit, while a custom that lands shall descend to the next male of the blood, exclusive of females, was good. In *Selby v. Robinson*,<sup>3</sup> it was held by the Queen's Bench, in 1788, that a custom for poor and indigent householders living in A. to cut and carry away rotten boughs and branches in a chase in A. could not be supported, the descriptions of the persons entitled being too vague. And in another early case it was held that no person had, at common law, a right to glean in the harvest-field; and that neither have the poor of a parish *legally settled* (as such) any such right, on the ground that such a right would be inconsistent with the nature of property, and that no right can exist at common law unless both the subject of it and they who claim it are certain.<sup>4</sup> So, a custom to pay twopence an acre in lieu of tithes is good; but were it to pay sometimes twopence and sometimes threepence, as the occupier of the land chooses, it is bad on account of its uncertainty.<sup>5</sup> "Yet a custom," as BLACKSTONE puts it,<sup>6</sup> "to pay a year's improved value for a fine on a copyhold estate is good, though the value be uncertain; for the value may at any time be ascertained, and the maxim of the law is, *Id certum est, quod certum redi potest*." So, a custom for the tenants of collieries to throw earth, stones, coals, etc., in heaps upon land *near* to certain coal-pits was held bad, on the ground that the word *near* was too uncertain.<sup>7</sup> In *Wilson v. Willes*,<sup>8</sup> the declaration was trespass for breaking and entering the close of the plaintiff, called Hampstead Heath, and digging and carrying away turf covered with grass, etc. Plea: that the *locus in quo* was parcel of a waste in the manor of Hampstead; that there had been from time immemorial divers customary tenements by copy of court-roll. And it then alleged a custom for tenants of such tenements, "having a garden or gardens, parcels of the same," to dig turf for the making or repairing of grass-plots in such gardens every year, at all times of the year, *in such quantity as occasion hath required*, and justified the taking accordingly. To this plea there was a general demurrer, and judgment was given for the plaintiff. Lord ELLENBOROUGH said that "a custom, however ancient, must not be indefinite and uncertain;" that it was "not defined what sort of improvement the custom extends to;" that "every part of the garden may be converted into grass-

Dane's Abr., chap. 26, § 5; *Millechamp v. Johnson*, Willes, 205; *Bell v. Wardell*, Willes, 202; *Steel v. Houghton*, 1 H. Black. 51; *Rex v. Ecclefield*, 1 Barn. & Ald. 360; *Lloyd v. Jones*, 12 Jur. 657; 17 L. J. (C. P.) 206; 6 C. P. 81.

<sup>2</sup> *Usages & Customs*, 21.

<sup>3</sup> 2 Term Rep. 754.

<sup>4</sup> *Steel v. Houghton*, 1 H. Black. 51.

<sup>5</sup> *Tanistry's Case*, Dav. 32; *Blewett v. Trengoning*, 3 Ad. & E. 554.

<sup>6</sup> 1 Bla. Comm. 61.

<sup>7</sup> *Wilkes v. Broadbent*, Willes, 63. But see *Marquis of Salisbury v. Gladstone*, 9 H. L. Cas. 692.

<sup>8</sup> 7 East, 121.



## A Custom must be Certain.

plots;" that there was "nothing to restrain the defendants from taking the whole of the turbary of the common," and it resolved itself into "the mere will and pleasure of the tenant." Similarly, in *Clayton v. Corby*,<sup>1</sup> an action of trespass for breaking plaintiff's close and digging and carrying away clay, the defendant justified as the owner of a brick-kiln, and pleaded that all occupiers thereof for thirty years had enjoyed as of right, etc., a right to dig, take, and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick-kiln, in every year, and at all times of the year. The plea was held bad, DENMAN, C. J., saying: "It is observable that in all cases of a claim of right *in alieno solo*, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation or restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint and to any number, but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved. Again: in the case of common of estovers, or a liberty of taking wood, called in the books house-bote, plough-bote, and hay-bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but, we believe, accurately given by Mr. Justice BLACKSTONE:<sup>2</sup> 'These several species of commons do all originally result from the same necessity as common of pasture, — viz., for the maintenance and carrying on of husbandry, — common of piscary being given for the sustenance of the tenant's family, common of turbary and fire-bote for his fuel, and house-bote, plough-bote, cart-bote, and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences for his ground;' that is, for a certain and definite purpose. \* \* \* The nature of the tenement (so-called), a brick-kiln, leads to no conclusion one way or the other as to the extent of the claim and demand upon the soil of the plaintiff. It may have been, at the time of the trespass, of any dimensions and capacity. It may have been during the thirty years of alleged enjoyment continually varying, and consequently the quantity of clay required for the purpose of making bricks thereat may have varied also. There is no limit. No amount of clay (measured by cart-loads or otherwise) required, no number of bricks (estimated by hundreds or thousands) claimed to be made, is given or attempted. What is it, therefore, but an indefinite claim to take all the clay 'out of and from the said close, in which,' etc.; in other words, to take from the plaintiff, the owner, the whole close?"<sup>3</sup>

§ 10. Likewise a Usage of Trade must be certain and uniform. — The rule that a custom must be certain and uniform is also strictly applied to usages of trade.<sup>4</sup> Where a usage of the cloth-trade was set up, to the effect that on the

<sup>1</sup> 5 Q. B. 415.

<sup>2</sup> 2 Bla. Comm. 35.

<sup>3</sup> See also *Peppin v. Shakespear*, 6 Term Rep. 718; *Duberley v. Paige*, 2 Term Rep. 391; *Shakespear v. Peppin*, 6 Term Rep. 741; *Valentine v. Penny*, Noy, 145; *Dean of Ely v. Warren*, 2 Atk. 189; *Hayward v. Cunningham*, 1 Lev. 231; *Hayward v. Cunningham*, 1 Sid.

354; *Earl of Manchester v. Vale*, 1 Saund. 28.

<sup>4</sup> *Fay v. Alliance Ins. Co.*, 16 Gray, 455; *Vos v. Robinson*, 9 Johns. 192; *Touro v. Cassin*, 1 Nott & M. 173; *Phillips v. Wheeler*, 10 Texas, 536; *Oelricks v. Ford*, 23 How. 49; *Singleton v. Hilliard*, 1 Strobb. 203; *Strong v. Grand Trunk R. Co.*, 15 Mich. 200; *Rogers v.*

## Illustrations.

sale of cloth the buyer had three days within which to send word to the seller that he would keep the goods, otherwise the seller could send for them back, some of the witnesses called to support the usage spoke of three days as the time, others a week, and one a month. BURROUGH, J., held that the usage was too uncertain to be valid.<sup>1</sup> And in *Sewell v. Corp.*,<sup>2</sup> where the custom alleged was one to pay veterinary surgeons for attendance as well as medicines, and the witness called stated that the general rule was to charge for attendance when there was not much medicine required, BEST, C. J., said: "Such a usage as this is too uncertain." So, a custom among wholesale merchants to allow their salesmen pay for time lost by sickness;<sup>3</sup> a usage among brokers that the margins put up to cover the advance in the commodity to be purchased must be "reasonable," no rule by which a "reasonable" margin can be determined being shown;<sup>4</sup> a custom among commission merchants, on sale of grain for cash, to wait two, three, or four days for the money.<sup>5</sup> In a Maryland case, where there was set up a usage among merchants in the city of Baltimore to deliver to purchasers merchandise sold for cash, without demanding the cash, and without the vendor waiving his right to cash payment, and the witness called to establish it said that he delivered the article without the cash only when he considered the purchaser good, the court said: "This is not a usage, which must be something fixed, certain, and universal. A usage which differs upon the action of each particular person is no usage. One man may think the purchaser good, when his next neighbor may think otherwise; and this is said to be a usage!"<sup>6</sup> And where it was attempted to prove a usage that cash sales were not understood as for cash in hand, but that payment might afterwards be made, the court said: "The evidence did not tend to prove it. No two of the witnesses agree as to what it was. Its protean form is recognized at one time as giving three days, and again as giving twenty-five days; sometimes counting from the day of sale, and sometimes from the date of delivery. Then, it is evanescent. It is in full force in one month, and gone the next. Certainty is one of the requisites of a good custom."<sup>7</sup> In an Indiana case, a custom among commission merchants that flour of a grade not suitable for the market and sale in the city of Indianapolis was, in the absence of special instructions, forwarded to the city of New York, was held to lack certainty, and to be therefore inadmissible. "It may well be asked," said ELLIOTT, J., "to what grade of flour does this alleged custom apply, to render it certain. The allegations imply that flour of some grade or grades is suitable to the Indianapolis market. If the custom defined that quality, then it might be inferred that all other grades were excluded, and should be shipped to New York. Or, if the custom defined the particular grades that were not suitable to the Indianapolis market, then the commission

*Mechanics' Ins. Co.*, 1 Story, 606; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26; *Illinois Masons' Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Cadwell v. Meek*, 17 Ill. 220; *Crawford v. Clark*, 15 Ill. 561; *Thorn v. Rice*, 15 Me. 263; *Isham v. Fox*, 7 Ohio St. 317; *Linsley v. Lovely*, 26 Vt. 123; *Hinton v. Coleman*, 45 Wis. 165; *United States v. Buchanan*, 1 Crabbe, 536; *United States v. Buchanan*, 8 How. 83; *United States v. Duval*, Gilp. 356; *United*

*States v. McCall*, Gilp. 563; *Collings v. Hope*, 3 Wash. C. Ct. 149.

<sup>1</sup> *Wood v. Wood*, 1 Car. & P. 59.

<sup>2</sup> 1 Car. & P. 392; *ante*, p. 2.

<sup>3</sup> *Sweet v. Leach*, 6 Bradw. 212.

<sup>4</sup> *Oelricks v. Ford*, 23 How. 49.

<sup>5</sup> *Stewart v. Scudder*, 2 Am. L. Reg. 60; *Contin v. Smith*, 24 Vt. 85.

<sup>6</sup> *Foley v. Mason*, 6 Md. 57.

<sup>7</sup> *Union R. Co. v. Yeager*, 34 Ind. 1.

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Certainty Required of a Usage.

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merchant, on the receipt of flour of the condemned grades, would at once know his duty. The plaintiff's shipment consisted of two different grades, single X and XXX, and yet both are condemned as unsuitable. The question involved concerns the shipper as much as it does the factor; and it is important for him, in his effort to become a competitor in the Indianapolis market, to know what grade of flour is suitable to the tastes of those depending on that market for supplies, or that may be demanded by the particular use to which it may be applied; or, if certain grades are to be condemned as unsuitable, and, under the alleged custom, sent to New York, to know what such grades are. If such a custom exists among the commission merchants of that place, and is certain and well defined, they should be able at once, by the inspection of the brand or quality of flour, to determine it promptly. The alleged custom, it seems to us, is void for uncertainty; because, by its terms as stated in the pleadings, it is impossible to determine what grade of flour is and what is not subject to its provisions, and condemned to be shipped to New York. It would seem to leave each factor to determine from his own judgment, if not his peculiar tastes, to what grades the custom applies. If each day is to determine its application, making it apply to one grade to-day and another to-morrow; if at one period it applies to all grades, and at another to none, it is not only wholly uncertain, but is misnamed a commercial usage."<sup>1</sup>

In *Berkshire Woollen Company v. Proctor*,<sup>2</sup> an innkeeper being sued for a sum of money stolen from the bed-room of a guest, the defendant relied upon a custom of the inns in that place for guests to deposit money in the office safe. Four proprietors of hotels were called to establish it. Two of them testified that they had printed regulations posted up in the rooms of their respective houses requiring their guests to leave their money and other valuable articles at the office, to be deposited for safety in the safe; the other two testified that they had printed regulations posted up in their houses, but they contained no notice as to depositing valuables. The usage was held inadmissible. "In two of the four houses, therefore, of whose custom evidence was particularly given," said FLETCHER, J., "it was the custom to give particular notice to the guests to deposit their money, and in two of them there was no custom to give such notice. There was, therefore, in the custom of these four houses a very striking want of uniformity in a matter of vital importance. In regard to the custom of the guests in these houses, it appears from the evidence that some of them deposited their money; and this is all which does distinctly appear. The evidence wholly fails to establish the position that there was any general, uniform custom of the guests even in those four houses to deposit their money in the safes." In a Maryland case, a deed of composition provided that "borrowed money" should be paid in preference to certain other debts, and it was claimed that these words had by usage a peculiar meaning among the merchants of the place. One witness defined the phrase as "money loaned on call, for which no charge is made;" another said: "If a person ask me to take money on interest for fifteen or twenty days, it would be borrowed money;" a third said: "If money is loaned for twelve months, on interest, it is not a debt of honor, nor if loaned for an indefinite time;" and a fourth witness testified: "If a party lends me money for

<sup>1</sup> *Wallace v. Morgan*, 23 Ind. 390. And see *Cincinnati, etc., R. Co. v. Boal*, 15 Ind. 345.

<sup>2</sup> 7 Cush. 417.

## Illustrations.

my accommodation, trusting to my honor, for an indefinite time, I consider it a debt of honor." The court held that the custom was inadmissible, as lacking the elements of certainty and uniformity, saying: "The testimony is inconsistent and contradictory. A standard so variable is incapable of application, and cannot control the well-understood meaning of words."<sup>1</sup> In one case, a custom, in making surveys of government land, to enclose more land than the warrant actually called for, was set up. Several witnesses were called to prove it. A. testified that it was customary for the earlier surveyors to make an allowance of five per cent in the length of the line. B. said it was usual for surveyors, in surveying rough, broken, and bushy land, to add four inches to the length of the chain, and some did and some did not add to the length of the line measured with a chain thus elongated. In resurveying some of the old surveys, he had found the lines generally to be longer than called for, some exceeding this length five per cent—some more, and some less. A few of the old surveys would fall short of the distance called for; there was a great variety of measurement in the old surveys, but generally they measured the distance called for. He knew of no general standard or proportion of excess. C. confirmed his statements. "It is certain," said the court, "that almost every locator has appropriated to himself more land than his warrants would entitle him to; but the question is, whether there has been any certain and uniform rule by which this class of persons have been governed in this respect, and whether that rule is the one insisted upon by the plaintiff's counsel. \* \* \* The testimony, so far as proving any known and certain custom, proves the reverse."<sup>2</sup> In another case, in order to prove a custom that the captain of a steamboat had authority to bind the owners by giving a premium-note for insurance, four witnesses testified. One said that the custom was for an owner and the captain to insure for all the owners, the captain signing the premium-note. Another said that it was customary for the captain to execute the note; but whether under authority of one or all of the owners, he did not say. A third testified that it was customary for the captain to insure for the boat and owners, but added, upon cross-examination, that he knew of no case where the captain was not directed by the owner. The fourth said that it was customary for the captain to insure for the owners, as was done in this case. On this evidence it was held that the custom was not proved, Gordon, J., saying: "From this testimony it is impossible to say what the custom or usage is, if indeed any such exists. Has the captain power, upon his own motion, to insure, or does it require the joint action of a part-owner and the captain? May he insure the boat when there is but a single owner, or is he confined to cases where there are several joint-owners? These are questions which are legitimately raised from the evidence, and as that evidence does not clearly and definitely answer either of them, the court should not have permitted it to go to the jury."<sup>3</sup>

A usage of trade to which no limit is assigned to its extent is bad. Where a usage of the brewing and distillery business was set up, and the opposing counsel asked, "What are the limits of the custom? Does it extend to all the distilleries in the kingdom, to all the brewers in the kingdom, to all the publicans in the kingdom? Or is it a custom which is applicable to a particular class,

<sup>1</sup> Murray v. Spencer, 24 Md. 520.<sup>2</sup> Adams v. Pittsburg Ins. Co., 76 Pa. St. 411.<sup>3</sup> Huston v. McArthur, 7 Ohio, 34.

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Customs must be Compulsory and Consistent.

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within how many miles of St. Paul's, or within what district? Would it prevail as between a distiller at Brentford, a brewer at Romford, a publican at Reigate, or is it confined to Hampstead, Brentford, and Hounslow?" the vice-chancellor thought the objection unanswerable.<sup>1</sup>

§ 11. **A Custom must be compulsory.**—A custom must be compulsory, and not left to each one's option to obey it.<sup>2</sup> "Otherwise," says Mr. BROWNE,<sup>3</sup> "it loses the imperative character of a law. It is true that agreements which were founded in consent were the origin of customs; it is true that the observances which have become, as it were, acted or pictured laws were at first matters of option; but whenever they are established customs they must have ceased to be matters of choice, and must have an obligatory element—a binding force. Were it in the option of every man whether he would conform to a custom or not, were it a matter which might be referred for decision to his good pleasure, it is evident that it would be invalid upon another ground, viz., uncertainty. A custom, to be binding, must be current. It must be known and understood by those whose conduct is to be affected by its existence, whose transactions are to be influenced by its factual terms; but if its terms were alterable at the will of each man, if it was in the option of each man to be bound to-day and not bound to-morrow by the custom, any one whose conduct might have to conform to such a rule would find it impossible to shape his actions accordingly, and any transactions which might have to be influenced by such a precept would be varying, indefinite, uncertain, and absurd."<sup>4</sup> Thus, as laid down by BLACKSTONE, "a custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and indeed no custom at all."<sup>5</sup>

§ 12. **A Custom must be consistent.**—Customs must be consistent with each other. One cannot be set up in opposition to another, for, if contradictory, they destroy each other.<sup>6</sup> If two customs are contradictory, it is evident that they cannot both have been established by mutual consent. Thus, the allegation of one custom is not to be met by the allegation of another custom inconsistent with the first, but rather by the denial of the existence of the first as a custom. This rule might well fall within that other one which requires that a custom shall be reasonable; for the absurdity and unreasonableness of two mutually inconsistent customs is evident, and if one custom be admitted to exist, the other, which is inconsistent with it, violates the requisite of reasonableness, and is therefore invalid.<sup>7</sup>

§ 13. **A Custom must be continued.**—A custom must be continued; there must be no interruption or temporary ceasing of the right.<sup>8</sup> "If," says Mr. BROWNE, "a custom ceased and recommenced, its new beginning would be within the

<sup>1</sup> *Daun v. City of London Brewery Co.*, L. R. 8 Eq. 155.

<sup>2</sup> 1 *Dane's Abr.*, chap. 26, § 6.

<sup>3</sup> *Usages & Customs*, 24.

<sup>4</sup> *Adams v. Otterback*, 15 How. 539; *Collings v. Hope*, 3 Wash. C. Ct. 149; *Donnell v. Columbian Ins. Co.*, 2 Sumn. 366; *Wilcocke v. Phillips*, 1 Wall. jr. 47.

<sup>5</sup> 1 *Bl. Comm.* 61.

<sup>6</sup> 1 *Dane's Abr.*, chap. 26, § 7; *Aldred's Case*, 9 Rep. 58 b; *Kenchin v. Knight*, 1 Will. 253; *Parkin v. Radcliffe*, 1 Bos. & Pul. 282.

<sup>7</sup> *Browne on Usages & Customs*, 25.

<sup>8</sup> 1 *Dane's Abr.*, chap. 26, § 1.

<sup>9</sup> *Usages & Customs*, 16.

## Acts of Accommodation.

memory of man, and would be due to the will of an individual, which would exclude it from the definition of a custom, and make any usage subject to such a lapse void as a custom. But an interruption which is to prove valid as against a custom must be an actual interruption of the usage, and not simply an interruption of the possession of the right.<sup>1</sup> One of the common illustrations will serve to make this clear. Thus, if the inhabitants of a parish have a customary right to water their cattle at a certain pool, a mere discontinuance of the practice for ten years would not destroy the custom, although it would add to the difficulty of proving its existence. If, however, the right be discontinued for a single day, that would prove the non-existence of any asserted custom analogous with the right. But it must be remembered that the existence of a custom depends upon proof, and that the discontinuance of a custom, as it tends to increase the difficulties of proof, tends also, to that extent, to the abolition of the custom. It cannot be doubted that a custom can be abrogated by a custom, and that many of the usages which at present exist are built upon the ruins of forgotten customs. That these antecedent customs which differ from our present practice or common habit must be forgotten, to render our present custom valid, is evident; otherwise the custom which is now in vogue would not have that element of antiquity and immemorability to which we have already alluded. But as the acts of some make a law, so can the acts of some abrogate it." "A custom," said TINDAL, C. J., in his judgment in *Tyson v. Smith*,<sup>2</sup> "comes at last to an agreement, which has been evidenced by repeated acts of assent on both sides from the earliest times, before time of memory, and continuing down to our own times, that it has become the law of a particular place." So of a usage of trade.<sup>3</sup> A usage which is proved to exist at a period long before the time of the transaction which it is introduced to affect, and not since, is inadmissible.<sup>4</sup> And for similar reasons, in *Fellows v. Mayor of New York*,<sup>5</sup> the custom of a city department in charging interest on sums advanced to contractors was held inadmissible, it appearing that the custom had been one way down to the year 1858, under one comptroller, and another way from 1858 to 1878, under other comptrollers. Where the knowledge of a witness who was introduced to prove a usage was not later than a year before that time, the usage was held not sufficiently proved.<sup>6</sup>

§ 14. Acts of Accommodation or Indulgence do not make a Usage. — Thus it is that a mere habit of accommodation or indulgence does not establish a usage.<sup>7</sup> A creditor, for example, may indulge a debtor in one or two cases without thereby binding himself to do likewise in the future.<sup>8</sup> As said by HOAR, J., in *Metcalf v. Weld*,<sup>9</sup> "There are many usages of trade which have nothing to do with the contracts of parties, and which cannot be set up to modify or control them. It is very customary for merchants to pay their debts by checks upon a bank; and this may be very well known to persons who deal with them,

<sup>1</sup> Co. Lit. 114.<sup>2</sup> 9 Ad. & E. 406.<sup>3</sup> Johnson v. Stoddard, 100 Mass. 306; *Masters v. Pennsylvania R. Co.*, 59 Pa. 81, 371.<sup>4</sup> *Michigan Central R. Co. v. Coleman*, 28 Mich. 440; *Walker v. Barron*, 6 Minn. 508.<sup>5</sup> 17 Hun, 219.<sup>6</sup> *Hale v. Gibbs*, 43 Iowa, 380.<sup>7</sup> *Farlow v. Ellis*, 15 Gray, 229; *Cincinnati, etc., R. Co. v. Boal*, 15 Ind. 345.<sup>8</sup> *Brent v. Cook*, 12 B. Mon. 268.<sup>9</sup> *Ante*, p. 14.



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and yet no one is bound to receive a check in discharge of a promise to pay money. It may be a custom in some kinds of business to pay workmen in orders for goods, or in goods kept for sale by their employer, or not to pay wages punctually at the time they are due, and the fears or necessities of the laborer may induce him to yield to the custom, and accept payment in a manner or at a time convenient to the employer; but it would hardly be contended that such a custom could be regarded in determining the legal effect of a written agreement." Thus, the common act of courtesy which induces a man to call on his mechanic to rectify what is amiss in his job does not establish a custom to exonerate the trade from responsibility for bad work.<sup>1</sup> In a Maine case it was said that, however common it may be for persons, in receiving payments, to waive their strict legal rights and to make use of a paper currency, such a habit would not bind any one who chose to insist upon his legal right to receive gold and silver.<sup>2</sup> In a Maryland case it is said: "Because the plaintiffs had been constant customers of the bank, which had discounted for them many like drafts and immediately sent them on for acceptance, when the law did not require it, was no just reason to compel the bank, at the risk of being held liable for negligence, to pursue a similar course in the future. The concession of such a favor, though repeated in sundry instances, ought not to be construed to operate as imposing upon the bank the imperative duty of its constant repetition, and as conferring upon the plaintiffs the absolute right to demand and insist upon its continuance. However much the plaintiffs might be disappointed in their expectations upon the subject, the legal relations of the parties were not changed thereby."<sup>3</sup> A usage among mills in Lowell to give a certificate of honorable discharge to an operative who had worked a certain term and performed certain conditions, which certificate would obtain him employment in other mills, does not render it obligatory to give such a certificate in all cases where the conditions have been complied with; the giving of such a discharge is a matter of discretion in the particular mill.<sup>4</sup> Where a contract as to land gives no right to cut the timber, evidence that the owner had permitted others, under similar contracts, to cut timber without considering them trespassers, is irrelevant.<sup>5</sup> And the mere act of a railroad company in paying for the medical services of an employee injured in its service would hardly establish such a custom for subsequent cases which might arise.<sup>6</sup>

§ 15. But cannot be changed to the prejudice of others. *On some Cases.* — But, though the practice of a particular business may at a time be altered by those engaged in it, yet an arbitrary change cannot be made, to the prejudice of others, without some notice of the change. Perhaps such notice would not be sufficient, if a party was not given sufficient time to adapt his conduct to the new custom. As sustaining this view, the English case of *Cumming v. Shand*<sup>7</sup> seems in point. Bankers had taken up certain bills for a customer upon the security of proceeds to be expected from certain consign-

<sup>1</sup> *Somerby v. Tappan*, 1 Wright, 570.

<sup>2</sup> *Lord v. Burbank*, 18 Me. 178.

<sup>3</sup> *Citizens' Bank v. Grafflin*, 31 Md. 507.

<sup>4</sup> *Thornton v. Suffolk Man. Co.*, 10 Cush.

<sup>5</sup> *Norton v. Heywood*, 20 Me. 359.

<sup>6</sup> *Mobile, etc., R. Co. v. Jay*, 61 Ala. 247.

<sup>7</sup> 5 Hurl. & N. 95.

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ments, and at the same time allowed him to continue to draw upon his deposit account with them. This practice had existed for some time, when, some goods remaining unsold and the market price having gone down, they refused to pay one of his drafts. In an action by the customer, it was left to the jury to say whether the course of dealing of the parties had been understood as on this footing, or whether it was a mere act of indulgence on the part of the bank; if the former, they were instructed that the bankers could not suddenly, and without notice to him, interfere with this custom. The jury found for the plaintiff. "I am of the opinion," said POLLOCK, J., "that the case was properly left to the jury. No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer: for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker, if the circumstances are such as to justify the other in drawing, though he has not a cash credit, he is entitled to do so until he has notice that the accommodation is discontinued. The question, then, is whether there was between the plaintiff and the bank a course of business which could not be put an end to without a reasonable notice. It seems to me that there is no objection to the mode in which the case was left to the jury, and that they have arrived at a proper conclusion." MARTIN, WATSON, and CHANNELL, BB., concurred. Of course there is a difference, and this case recognizes it, between such an established practice as to entitle the customer to demand its continuance until he has received a proper notice of its cessation, and a mere voluntary courtesy, which a man may extend on one day to one person, and refuse the next to another or the same person. In the latter case there is no implied promise to repeat or continue the favor; the party receiving it understands this well, and there is nothing on which a different idea could be founded. This would seem to be the correct test in such cases; and though each case would depend entirely upon its particular facts and circumstances, its *status* would not be difficult to determine.<sup>1</sup>

§ 16. **A Common-Law Custom must be General.** — In *Viner's Abridgment*<sup>2</sup> it is said: "Information in the Exchequer against a merchant for lading wine in a strong ship; the defendant pleaded license of the king, made to J. S., to do so, which J. S. had granted his authority thereof to the defendant, and that there is a custom among merchants throughout England that one may assign such license to, and that the assignee shall enjoy it, etc., which was demurred in law; and it was agreed for law that a man cannot prescribe custom throughout England, for if it be throughout England, it is a common law, and not a custom; *contra*, if the custom had been pleaded to be in such a city or county. \* \* \* Note the diversity." In *Fitch v. Rawling*,<sup>3</sup> while it was held that a custom for all the inhabitants of a parish to play all kinds of lawful games and pastimes in a close, at all seasonable times of the year, was good: yet a similar custom for all persons whatever happening to be in the said parish was held bad, BULLER, J., saying: "How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be

<sup>1</sup> See *Harper v. Calhoun*, 7 How. (Miss.) 203; *Van Almee v. Bank of Troy*, 8 Barb. 312.

<sup>2</sup> Tit. "Custom."

<sup>3</sup> 2 H. Black. 393.



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confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom." Later, in *Tyson v. Smith*,<sup>1</sup> which was an action of trespass, to which a custom for all victuallers to erect booths on the land in question during certain fair-days was set up, it was objected that it was general, as amounting to the common law. But this objection was overruled. "Admitting, for the purpose of argument," said TINDAL, C. J., "that a custom which would comprehend within it all the liege subjects of the crown would be bad, on the ground of its amounting to the common law, we think the custom before us is not of that description; for in the present custom there are these restrictions, which necessarily limit its generality: The parties who claim the benefit of it must be victuallers; they must be victuallers coming to keep the fair, and they must come at the precise period of the year at which the fair is fixed. Now, under the description of victuallers mentioned in the custom, we cannot consider that very large body of persons to be comprehended who, in ancient times, appear to have been classed under that designation by the statutes referred to in the argument; but we think the plea must be taken to speak in the language of the time at which it is pleaded, and, as the only term used is that of 'victualler,' it must be understood those only are comprehended who are now so termed — that is, persons authorized by law to keep houses of entertainment for the public. This removes the case at once from the application of *Fitch v. Rawling*,<sup>2</sup> where the custom comprehended all the liege subjects of the crown being in the parish at any time."

§ 17. How far Generality is required of a particular Custom. — As a general usage is a part of the common law, as appears from these cases, and as we have also seen in a former section, it seems somewhat of a contradiction of terms to say that a particular custom or a local usage of trade must be *general* in order to be valid, yet it is so laid down in a number of cases.<sup>3</sup> In all cases in which this is stated as a requisite to the validity of a usage, the question at issue has been whether the party to be affected by it has been proved to have been acquainted with it. Knowledge of a usage is, as we shall see, necessary in every case in order to bind a person by its terms. Sometimes this notice must be expressly proved, and sometimes, from its generality and notoriety, the law raises the presumption that it was known. It is, therefore, only as affecting the question of notice that the generality of the usage becomes material; for a practice may exist between two only, and yet bind them in all subsequent dealings unless abrogated by both.<sup>4</sup> And as express notice is difficult to prove, because in the majority of cases nothing has been said by the parties in their

<sup>1</sup> 1 Nev. & P. 784; 1 Per. & Dav. 307.

<sup>2</sup> *Ante*, p. 39.

<sup>3</sup> *Thompson v. Albert*, 15 Md. 268; *Holford v. Adams*, 2 Duer, 471; *Citizens' Bank v. Grallin*, 31 Md. 507; *Chastain v. Bowman*, 1 Hill, 270; *Folsom v. Merchants', etc., Ins. Co.*, 38 Me. 414; *The Commonwealth v. Mayloy*, 57 Pa. St. 291; *Cope v. Dodd*, 13 Pa. St. 33; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 420; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 103; *Gurney v. Behrend*, 3 El. & Bl. 634; *Coventry v. Gladstone*, L. R. 4

Eq. 491; *Oelricks v. Ford*, 23 How. 49; *Richardson v. Goldard*, 23 How. 44; *Coffman v. Campbell*, 87 Ill. 98; *Bissell v. Ryan*, 23 Ill. 506; *Duvall v. Bank*, 1 Gill & J. 31; 9 Gill & J. 31; *Rogers v. Mechanics' Ins. Co.*, 1 Story, 606; *Fulton Ins. Co. v. Milner*, 23 Ala. 420; *Sweeting v. Pearce*, 7 C. B. (N. s.) 449; *De Hertel v. Supple*, 13 Upper Canada Ch. 648; 14 Upper Canada Ch. 421; *Fisher v. Western Assur. Co.*, 11 Upper Canada Q. B. 255.

<sup>4</sup> *Cumming v. Shand*, 5 Hurl. & N. 95; *Hotchkiss v. Artisans' Bank*, 42 Barb. 517.

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negotiations about the usage, it is obvious that in the greatest number of instances it becomes absolutely necessary to prove such a usage as the law will presume the party intended to be bound by; and, consequently, in all these cases the generality of the custom becomes vital, and the rule that a usage must be general is applied by the courts with rigor.

It becomes, therefore, of importance to determine what the courts understand by this rule. And in the first place it is settled that a usage may be "general," as this term is used here, notwithstanding that it is confined to a particular city, town, or village.<sup>1</sup> It may be generally known in that city, town, or village, and be understood by all persons dealing there, and yet may not exist in any place beyond. But the usage of a single house,<sup>2</sup> or of one person only,<sup>3</sup> or of a single mill,<sup>4</sup> or of one railroad company,<sup>5</sup> is insufficient. It has been held that evidence of a custom in the cities of New Orleans, Cincinnati, and Louisville would not be alone sufficient to prove a general custom of merchants upon the Mississippi River and its tributaries.<sup>6</sup> And it is held in Massachusetts that it does not show a usage of trade to show that many persons, or a majority of persons, engaged in the business practice a particular mode. The practice must be universal; it must be *the mode*.<sup>7</sup> Isolated instances of a certain practice in a particular bank, — as, for instance, the payment of a loss in an unusual case,<sup>8</sup> — or proof of a few instances of dealings in one or two other banks, do not establish a general usage.<sup>9</sup> A particular banking usage must apply to a place rather than to a particular bank. It must be the rule of all the banks in the place or it cannot be a valid usage. If every bank, it has been said, could establish its own usage, the confusion and uncertainty which would ensue would greatly exceed any local convenience resulting therefrom.<sup>10</sup> In *Rickford v. Ridge*,<sup>11</sup> Lord ELLENBOROUGH said: "I cannot hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's, and another for the westward. They might as well fix upon St. Peter's at Rome."

To establish a usage on the part of municipal corporations, it must be a general usage among like towns and cities, and not a usage in a single town or city.<sup>12</sup>

In a case where the question was whether there had been a deviation by a vessel which would discharge the underwriter, and a witness stated that he

<sup>1</sup> *Gleason v. Walsh*, 43 Me. 397; *Thompson Hamilton*, 12 Pick. 426; *Perkins v. Jordan*, 35 Me. 23; *Clark v. Baker*, 11 Mete. 188.

<sup>2</sup> *Weber v. Kingsland*, 8 Bosw. 415.

<sup>3</sup> *Burr v. Sickles*, 17 Ark. 423.

<sup>4</sup> *Schlessinger v. Dickinson*, 5 Allen, 47; *Stevens v. Reeves*, *ante*, p. 7.

<sup>5</sup> *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99. But a court may refuse to charge that the usage of one boat does not constitute a custom of the trade, where no foundation for such a charge appears from the evidence. *Langford v. Cummings*, 4 Ala. 46.

<sup>6</sup> *Walsh v. Frank*, 19 Ark. 270.

<sup>7</sup> *Porter v. Hill*, 114 Mass. 166.

<sup>8</sup> *Allen v. Merchants' Bank*, 22 Wend. 215.

<sup>9</sup> *Chesapeake Bank v. Brown*, 29 Md. 483.

<sup>10</sup> *Adams v. Otterback*, 15 How. 539.

<sup>11</sup> 2 Camp. 537.

<sup>12</sup> *Butler v. City of Charlestown*, 7 Gray, 12. "In considering this subject of usage," says Shaw, C. J., in *Spaulding v. Lowell*, 23 Pick. 71, "It is proper to add that it is not a casual or occasional exercise of a power by one or a few towns which will constitute such a usage, but it must be a usage reasonable in itself, general among all towns of like situation as to settlement and population, and of long continuance." "A casual or occasional exercise of a power by one or a few towns will not constitute a usage." *Hood v. Lynn*, 1 Allen, 103.

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had known two vessels on a similar voyage make a similar call, Mr. Justice WASHINGTON said: "The evidence given \* \* \* is very far from proving a usage of trade. Twenty instances may have occurred of vessels not being otherwise provided with persons acquainted with the traffic in males on the Main, calling there to obtain such a person; and as many instances may have occurred of vessels proceeding with a supercargo brought from the port of the vessel's departure, relying upon finding such a character at Coro. But there is no proof of a usage. It should appear that this course is uniformly pursued, and that it should be known as well to the underwriters as to the insured. The former must take notice of the usage of trade, but then it must be uniform and fixed." And a verdict was returned for the defendants.<sup>1</sup> And in a subsequent case Mr. Justice STORY said: "As to the question of usage: in order to support that defence it was not sufficient that a few instances could be produced in which masters in the trade had transhipped goods, and no objection had been made. The course of the trade must be uniform and general to entitle it to be considered as a legal defence. It should be so well settled that persons engaged in the trade must be considered as contracting with reference to the usage; and as the proof of such usage lay on the defendant, the jury ought not to change the general principles of the law as to the rights of the parties, unless the usage were fully proved to be uniform and independent of the consent of particular shippers."<sup>2</sup> In an old English case, where, in a case of insurance effected from Liverpool to Jamaica, the ship put into the Isle of Man, and it appeared that ships bound on that voyage *sometimes*, but not *usually*, put in there, it was held that the proof did not amount to such a well known and settled usage of the trade between Liverpool and the West Indies as to prevent it from being a deviation.<sup>3</sup> In *Child v. Sun Mutual Insurance Company*,<sup>4</sup> where a policy of marine insurance was on a "whaling voyage," the policy having been executed in New York on a Rhode Island whaling-ship, the plaintiffs claimed that the words above quoted included the taking of sea-elephants on the beaches of islands and coasts, as well as the catching of whales wherever found. The defendants offered to prove that previous to the date of the policy it had been the general and uniform usage of assurers at the port of New Bedford, when it was intended to employ in taking sea-elephants a vessel insured on a whaling voyage, to insert a permission to that effect in the policy, for which an additional premium was paid. The trial judge excluded the testimony, and his ruling was affirmed on appeal. "On considering the point," said SANDFORD, J., "we think the proposed evidence was inadmissible, for two reasons at least, viz.: 1. It was a local usage, not extending to New York, where the policy in suit was made, nor to Warren, Rhode Island, where the assured resided, and to which port the vessel belonged. 2. It was the usage of the assurers only; and although from the payment of premium we might infer the assent of the assured, the limited terms of the offer would leave it in doubt whether the assent was a ratification or admission of the usage, or was caused by greater caution and a desire to leave no room for controversy. If it were the well-established usage at New Bedford that a whaling voyage did not include sea-elephanting, the underwriters and

<sup>1</sup> *Martin v. Delaware Ins. Co.*, 2 Wash. C. Ct. 254.

<sup>2</sup> *Trott v. Wood*, 1 Gall. 444.

<sup>3</sup> *Salisbury v. Townson*, 1 Arnould on Ins. 55.

<sup>4</sup> 3 Sandf. 26.

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the masters of whalers in that port could have proved it far more satisfactorily than it could possibly be done by the production, without explanation, of the policies executed by and between them. It would then have appeared whether the insurers there refused to pay a loss in cases where the vessel insured had taken sea-elephants without any permissive clause in the policy." In *Couch v. Watson Coal Company*,<sup>1</sup> the plaintiff was employed by the defendant in its mine, and was injured, while ascending the shaft in a cage, from a drill which fell from a descending cage. He sought a recovery on the ground that the cages were defective in not being supplied with bonnets, or coverings. As tending to show that the cages were defectively constructed, and that the defendant was therefore guilty of negligence in using them, the plaintiff called a witness who testified to having worked for many years in coal-mines in Wales and Pennsylvania where steam machinery was used. He was thereupon asked, "What was the custom, or how was the machinery constructed — how were the cages constructed as to bonnets?" To which he answered, "I only worked in one shaft." He was then asked, "How was that as to bonnets?" and replied, "There was what we called bonnets, or covers, there in that one shaft." In the Supreme Court this evidence was held to have been improperly admitted. "Before a custom can affect the rights of parties," said the court, "it must be so general that a knowledge thereof by them may be presumed. For instance, before the defendant could be deemed guilty of negligence in the construction or use of the cages, the custom under which it was sought to make it liable should be so general that the defendant could be presumed to have knowledge of its existence. The fact that bonnets were used in one mine in Pennsylvania or Wales had no tendency to prove the existence of such a custom there, much less here. Besides, mines, of necessity, must be of various depths, and what would be proper machinery for one might not be for another. What is customary in Pennsylvania may not be so here. If it had been shown that operators of mines in this State, similarly situated, and using substantially the same kind of machinery, generally constructed cages with bonnets, it could be reasonably presumed that defendant had knowledge of such custom, and the failure to do what was usual and generally done by others in a similar business and under similar circumstances would have a tendency to show that these cages were improperly and negligently constructed." In an action for the use of a canal-boat, it was attempted to be proved that a custom existed in and about the port of New York, when the owner of freight takes charge of the boat and pays all the expenses during the winter, to deliver the boat to the owner in the spring, free of charge, and to charge nothing for the use of the boat. This was sought to be established by the testimony of two witnesses who had been in the habit of so leaving their boats without charge for the same. One of them testified that the boat is unloaded and delivered in the spring without charge for its use, the one being set off as an equivalent for the other. It was held that the proof was not sufficient to establish a general custom.<sup>2</sup> Proof that a certain practice of factors "was very common in the trade, but a few factors in Mobile would not do so," is insufficient to establish a usage.<sup>3</sup> And evidence that it was "very unusual" to do a certain thing would not prove a usage not to do so.<sup>4</sup>

<sup>1</sup> 46 Iowa, 17.

<sup>2</sup> *Sipperly v. Stewart*, 50 Barb. 62.

<sup>3</sup> *Austill v. Crawford*, 7 Ala. 335.

<sup>4</sup> *Rennell v. Kimball*, 5 Allen, 356. And see *Cooke v. Fiske*, 12 Gray, 491.

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On the other hand, it is clear that a usage of trade may have a greater or less territorial extent, or a more general or restricted, according to the circumstances which gave rise to it;<sup>1</sup> and so, in *Sumner v. Tyson*,<sup>2</sup> evidence that a certain custom prevailed in three different establishments was considered sufficient to establish it as general. Again: in an action to recover for a number of logs which had become lodged in the defendant's boom on the Pemigewasset River, and had been converted and sawed by him, the plaintiff offered testimony that it was the custom in that locality, where logs were thus mingled, for the party owning the boom to separate and pass by the boom all logs not his own; but it appeared that there was no other boom on that river. The trial court, however, admitted the evidence, and the ruling was affirmed on appeal. "The fact that there was only one boom on the river at that time, and that the defendant was the owner of that one," said AMES, J., "furnishes no objection to the competency of the evidence. There may have been an established and ancient usage in that locality and in that department of business, of the kind which the plaintiff offered to prove, and the defendant may have habitually complied with it. If so, it was competent for the plaintiff to show it."<sup>3</sup>

In an Iowa case,<sup>4</sup> where a usage among the merchants in a certain city to regard certain paper as negotiable was set up, and it was objected that, as by the State Constitution all laws were required to be uniform, and therefore, by statute, a note could not be negotiable in one city and not so in another, neither could a custom be recognized which would result in the same thing, the court said: "It must be remembered, however, that we have no statute prohibiting such custom. A custom in a particular locality, when not in violation of law, becomes a law to parties contracting with a knowledge of it. The same general rule as to what makes custom, and its application in the construction of contracts, obtains uniformly over the State. It might as well be claimed that all parties must make the same kind of contracts as that they may not contract in reference to different customs."

In *Lewis v. Marshall*,<sup>5</sup> A., a ship-broker, engaged with a ship-owner to have a full cargo for the ship, the rates of freight for which would average 40s per ton, and at least nine cabin-passengers, passage-money to average £75. The contract was fulfilled as to the cabin passengers, but the average rate of freight for goods put on board by A. amounted to only 32s per ton. He shipped on board, however, several steerage-passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, etc., when added to the freight of the cargo, properly so called, made the average earnings of the whole ship per ton amount to more than 40s. It was held that, as the contract was an unusual one, evidence was not admissible to show that the terms "cargo" and "freight," used with reference to the voyage on which the ship was engaged, would, by the general usage and course of the trade, be considered to comprise steerage-passengers and the net profit arising from their passage-money.

§ 18. A Usage must be known. — A usage must be known to the party to be affected by it, before a court will permit its recognition.<sup>6</sup> In the case of general

<sup>1</sup> *Dixon v. Dunham*, 14 Ill. 324.

<sup>2</sup> 20 N. H. 384.

<sup>3</sup> *Saunders v. Clark*, 106 Mass. 331.

<sup>4</sup> *Rindskoff v. Barrett*, 14 Iowa, 101.

<sup>5</sup> 7 Man. & G. 729.

<sup>6</sup> Story on Bail., § 543; Hutch. on Car.,

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commercial usages, — all men being taken to know the law, — every member of the community is presumed to know them, and no one will be heard to contradict this presumption.<sup>1</sup> But in the case of particular usages it is different; knowledge of them is not legally imposed upon the dweller in the particular place, or the dealer in the particular market where they obtain,<sup>2</sup> and is to be shown by express proof, or by evidence of their generality and antiquity. These three elements of a valid usage — antiquity (understood not in its common-law meaning, but in the sense of being established), generality, and notoriety — are intimately connected, because the first two are so frequently necessary to make good the third. Thus, in *Womersley v. Dally*<sup>3</sup> it was held that a custom, not of the country, but prevalent only between the owner and tenants of a particular landed estate, was not binding on a tenant who became such without express notice of its existence. And the general usages of the insurance trade are presumed to be known to dealers,<sup>4</sup> while the particular ones are not.<sup>5</sup> So of the usages of carriers and others.<sup>6</sup>

§ 19. Usages not known to Parties not binding. — Therefore, the usage of auctioneers to charge certain fees for their services is not binding on a purchaser;<sup>7</sup> the usage of factors as to the disposition of the funds of their prin-

§ 40; *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *Marsh v. Jeff*, 3 Fost. & Fin. 234; *Lansdowne v. Somerville*, 3 Fost. & Fin. 236; *Pierce v. Whitney*, 29 Me. 188; *Martin v. Maynard*, 16 N. H. 165; *Mills v. Ushe*, 16 Texas, 800; *Marlatt v. Clary*, 20 Ark. 251; *Boyd v. Graham*, 5 Mo. App. 403; *Martin v. Hall*, 26 Mo. 386; *Walsh v. Mississippi Transp. Co.*, 52 Mo. 434; *The Albatross v. Wayne*, 16 Ohio, 513; *Sutton v. Great Western R. Co.*, 11 Jur. (N. S.) 879; *Buckle v. Knoop*, L. R. 2 Exch. 125; *Moore v. Voughton*, 1 Stark. N. P., 487; *Wheeler v. Newbould*, 5 Duer, 29; *Bradley v. Wheeler*, 44 N. Y. 500; *Higgins v. Moore*, 34 N. Y. 425; *Dawson v. Kittle*, 4 Hill 107; *Dodge v. Favor*, 15 Gray, 82; *Fisher v. Sargent*, 10 Cush. 250; *Searson v. Heyward*, 1 Spears, 249; *Whitesell v. Crane*, 8 Watts & S. 369; *McDowell v. Ingersoll*, 5 Serg. & R. 101; *Patterson v. Franklin Ins. Co.*, 22 Pittsb. L. J. 201; *Pitre v. Offutt*, 21 La. An. 679; *Lewis v. The Success*, 18 La. An. 1; *Leach v. Perkins*, 17 Me. 462; *Sugart v. Mays*, 54 Ga. 554; *Scott v. Saffold*, 37 Ga. 384; *National Bank v. Burkhardt*, 100 U. S. 636; *Bliven v. New England Screw Co.*, 23 How. 420; *Power v. Kane*, 5 Wis. 265; *Scott v. Whitney*, 41 Wis. 504; *Boardman v. Gaillard*, 1 Hun, 217; *Butterworth v. Volkening*, 4 N. Y. S. C. (T. & C.) 650; *Dugard v. Edwards*, 50 Barb. 289; *Torrance v. Hayes*, 2 Upper Canada C. P. 338.

<sup>1</sup> *Rindskoff v. Barrett*, 14 Iowa, 101; *Beatty v. Gregory*, 17 Iowa, 109.

<sup>2</sup> When the term "usages of trade" is made use of, it admits of an application

either to the general usages of trade which compose the law of merchants, of universal authority among commercial men in civilized societies, and forming one of the constituent parts of the laws of the State, as the general law of the land, or to "usages of local origin," as prevailing in a particular branch of trade. The former are considered in the nature of those positive laws of which every member of the community is presumed to be conversant, and which are resorted to as known and established tests of contracts in all cases arising under them. The latter depend upon the usage of the persons engaged in the traffic to which they apply, the knowledge of which is not legally imposed on the community, but derives its binding force from the supposed knowledge of the persons engaged in that particular species of traffic at the place or in the trade in which it obtains. The latter may be proved by witnesses. *Kent, Ch.*, in *Sleight v. Hartshorne*, 2 Johns. 532; *Hinton v. Locke*, 5 Hill, 434; *Buck v. Grimshaw*, 1 Edw. Ch. 140.

<sup>3</sup> *Ante*, p. 5.

<sup>4</sup> *Toledo, etc., Ins. Co. v. Speares*, 16 Ind. 52; *Grant v. Lexington Fire Ins. Co.*, 5 Ind. 23.

<sup>5</sup> *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Howard v. Great Western Ins. Co.*, 109 Mass. 384. And see *post*, §§ 25, 26.

<sup>6</sup> *Barrett v. Williamson*, 4 McLean, 529. And see *post*, Chap. III.

<sup>7</sup> *Miller v. Burke*, 68 N. Y. 625.



## Knowledge of their Existence.

cipals will not affect the latter;<sup>1</sup> the usage of a merchant as to the commission allowed to agents will not bind an agent;<sup>2</sup> the usage of cabinet-makers not to employ workmen except by the day, cannot affect a purchaser;<sup>3</sup> the private custom of brokers as to the deposit of checks will not change the legal obligation of a party indorsing a check on a bank to pay the same when legally presented;<sup>4</sup> the private custom of the lessor of a mine will not bind the lessee;<sup>5</sup> the usage of livery-stable keepers in a particular city to have a lien for their charges upon horses delivered to them to keep, cannot affect a customer,<sup>6</sup> where in all these cases, respectively, the usages were unknown to the parties to be charged. In *Pierpont v. Fowle*,<sup>7</sup> A. employed B. to compile a school-book, called the "American First Class-Book and National Reader," giving him certain suggestions as to its character and form, and paying him \$500 in cash. B., in return, conveyed to A. the copyright, and the book was published by A. with B.'s name on the title-page as author. It was held, in the United States Circuit Court for the District of Massachusetts, that only the copyright for the first term had been conveyed; that the author, being alive at the end of the four-teen years, had a sole interest in the additional term; and that a usage among booksellers to consider the second term as passing with the first did not affect B., who was not conversant with it, not being a bookseller. Where it was attempted to show that, by the usage among the publishers and conductors of newspapers and printing establishments, a sale of the good-will and subscription-list takes from the seller the right to establish a competing journal and printing-office, it was held that the evidence offered failed to show a usage "so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to and in conformity with it."<sup>8</sup> In *Berkshire Woollen Mills Company v. Proctor*,<sup>9</sup> the plaintiff's agent went to Boston for the purpose of attending to a lawsuit, taking with him about \$1,000 of their money to defray expenses. He put up at the Marlboro Hotel, which was kept by the defendant, on the 15th of October, 1849, and deposited the money in his trunk in his room,

<sup>1</sup> *Farmers', etc., Bank v. Sprague*, 52 N. Y. 605.

<sup>2</sup> *Flynn v. Murphy*, 2 E. D. Smith, 378. In this case the plaintiff sued for commissions in obtaining, as the defendant's agent, orders for engraving, die-sinking, etc. On the trial, the question was put to a witness by the defendant's counsel, "What is the usual and uniform rate of commissions allowed by the defendant to his agents?" This question was held, on appeal, to have been properly disallowed. "The inquiry," said WOODRUFF, J., "into the usual or uniform practice of the defendant in regard to paying commissions, standing by itself, was, I think, clearly inadmissible. No such private practice could affect the plaintiff's title to recover what his services were worth, unless it was shown that the plaintiff rendered his services with notice of the defendant's usage in his business, of a character

so explicit as to warrant a finding, in the absence of any express agreement, that he assented to such usage, and rendered his services in view of the compensation which such usage would afford him."

<sup>3</sup> In this case the question was whether furniture was sold by a contract as to its price; and proof that, under the regulations of cabinet-makers, workmen could not be employed to manufacture such furniture except by the day, was held inadmissible against a purchaser having no notice of such regulations. *Butterworth v. Volkening*, 4 N. Y. S. C. (T. & C.) 650.

<sup>4</sup> *Currie v. Smith*, 4 N. Y. Leg. Obs. 343.

<sup>5</sup> *Beatty v. Gregory*, 17 Iowa, 109.

<sup>6</sup> *Saint v. Smith*, 1 Coldw. 51.

<sup>7</sup> 2 Woodb. & M. 23.

<sup>8</sup> *Smith v. Gibbs*, 44 N. H. 335.

<sup>9</sup> 7 Cush. 417.

Usages of the Stock Exchange.

taking from it, from day to day, small sums as he required them. On the 2d of November he counted his money, and found that he had exactly \$500, which he rolled up in a newspaper and placed at the bottom of his trunk, locking it. The day after, he found that the lock had been picked and the money stolen. The plaintiff having brought an action for the amount of money stolen, the defendant, at the trial, in order to charge the agent with negligence in not taking the proper precautions to secure the money, introduced evidence of the custom of guests at their hotel to deposit large sums of money and other valuable articles with the clerk, and in a safe provided by the proprietor for that purpose. The agent swore that he did not know of the custom. The defendant contended that he was nevertheless bound by the custom, and would be presumed in law to know it. But the court instructed the jury that if the plaintiff's agent had knowledge of the custom of defendant's hotel, the plaintiff would be bound by it; that if he had no knowledge of the custom the plaintiff would not be affected by it, unless he was wilfully ignorant of it. A judgment for the plaintiff was affirmed in the Supreme Court. "Proof of knowledge as a matter of fact," said FLETCHER, J., "is required in order to give effect to any and all particular usages, not of so general a nature as to furnish a presumption of knowledge. There certainly can be no legal presumption that every traveller who alights at an inn has knowledge of the particular usages of that particular inn, of which there is no notice in any way given to him."

§ 20. Usages of the Stock Exchange.—It is nevertheless true, that those who send goods to a market where a certain custom prevails are presumed to know the custom and to act upon it.<sup>1</sup> In *Sutton v. Tatham*,<sup>2</sup> it was laid down that a person employing a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though the principal himself be ignorant of them. "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." This language was subsequently approved in a later case, where it was said: "A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place."<sup>3</sup> In *Graves v. Legg*,<sup>4</sup> the defendants (London merchants) employed a broker in Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendants. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. It was held, both in the Court of Exchequer and in that of the Exchequer Chamber, that the defendants were bound by such usage, and,

<sup>1</sup> *Deforest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Bailey v. Bensley*, 87 Ill. 556; *Loneragan v. Stewart*, 55 Ill. 44; *Lyon v. Culbertson*, 5 Cent. L. J. 401.

<sup>2</sup> 10 Ad. & E. 27.

<sup>3</sup> *Bayliffe v. Butterworth*, 1 Exch. 425.

<sup>4</sup> 11 Exch. 642; 2 Hurl. & N. 210.



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therefore, that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. But this rule seems irreconcilable with the general principle that it is only to be presumed that the parties contracted according to the terms of an existing custom, and that that presumption is capable of rebuttal; for here we see that a usage may make a man liable to certain incidents of a contract, although he can satisfactorily prove that he was in ignorance of the custom. It also seems to be in almost direct opposition to the rules laid down in *Gabay v. Lloyd*,<sup>1</sup> *Burlett v. Pentland*,<sup>2</sup> and other cases.<sup>3</sup> In the first of these it was found, in special verdict, that a certain usage with respect to policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-House in London, and merchants and others effecting policies there, and that the policy in question was effected at Lloyd's Coffee-House; but it was not found that the plaintiff was in the habit of effecting policies at that place, and it was held that this usage was not sufficient to bind the plaintiff. And in the latter, a custom was proved to be in force at Lloyd's Coffee-House to consider a set-off as payment between underwriter and broker, and it was held that such custom was not binding on one who was not shown to be cognizant of it, or to have assented to it. In *Sweeting v. Pearce*, the court thought the custom lacking the element of generality, it being the custom of a single house, and this house certainly not a "market." Yet these cases were decided before the case of *Bayliffe v. Butterworth* — in which the general principle that the usage of a particular market binds him who buys or sells in it, whether he is aware of it or not, was laid down — came before the Court of Exchequer; and PARKE, B., while he did not question the authority of these cases, distinguished them from the one before the court, which was one in which a person had been authorized to make a contract for a principal, and he remarked that it appeared to him that "a person who authorizes another to make a contract for him, authorizes him to make the contract in the usual way," and that "the question here was as to the authority which the plaintiff received." This Mr. BROWNE<sup>5</sup> considers a perspicuous distinction. The scope of authority is to be ascertained by the necessities which are incident to the act which an agent has to do. His action in the matter will be estimated by the possibilities of the trade in connection with which he transacts, and these possibilities are modified by the usages of the trade. It is in the power of the principal to define the agent's authority with a strictness which will prevent the operation of the customs of the place or trade. If he fails to do so, he must not complain if his authority is interpreted by the ordinary usages of the trade, and he finds himself bound by these even though he is ignorant of their existence. The character of the usage and its effect upon the relation of parties must be considered before it is admitted to affect a contract entered into by persons who were ignorant of it. Some usages are so evidently technical that it would be wrong to suppose that persons contracting without knowing them could reasonably anticipate their existence, or the existence of any in their factual connection. Many, on

<sup>1</sup> 3 Barn. & Cress. 793.

<sup>2</sup> 10 Barn. & Cress. 790.

<sup>3</sup> *South v. Irving*, 1 Barn. & Adol. 609.

*Sweeting v. Pearce*, 7 C. B. (N. S.) 449; *Adams v. Peters*, 2 Car. & Kir. 723.

<sup>4</sup> 1 Exch. 425.

<sup>5</sup> Browne on Usages & Customs, 70.

## When Binding, and on whom.

the other hand, are so palpably matters of general convenience, and belonging to a trade in such rapid growth, that it must be presumed to be making its own laws in the establishment of customs, that it is right to presume that the individual contracting, although ignorant of the particular custom, must have been aware of the existence of usages, may have surmised their nature, and even if he did not, was at least willing to enter into a contract the precise terms of which were unknown to him because the incidents were to be attached by a usage of which he was ignorant. Just as one man trusts another to work for him, with general authority as an agent, trusting to the honor and honesty of the individual, so may one trust a usage to regulate one's rights; for a usage is the outcome of the honor, honesty, fair dealing, and convenience of a class of men. The admissibility of proof of a usage as against one who was ignorant of it is a question which might well be left to be decided in each individual case. "There could," says Mr. BROWNE, "be little reason for dissatisfaction in the admission of a rule of the Liverpool Stock Exchange in evidence between parties not members of it, when the question was, what is a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers." The rule that a party dealing by an agent in the Stock Exchange is presumed to have knowledge of its customs, whether he really knew of them or not, is thus explained by FOLGER, J., in a New York case: "There are cases of principal and agent, where one has been set by another to do acts in a particular business, to be done at a particular locality, — as on Stock Exchange, — where the power to deal is a privilege obtained by payment of a fee, and is restricted to a body which has, for its regulation and government, come under certain prescribed rules or established usages; and as the agent could not do the will of his principal, nor could the principal himself, save in conformity with those rules or usages, it is held that the principal must be bound thereby, whether cognizant of them or not, and that ignorance will not excuse him."<sup>2</sup>

That persons having only occasional dealings with stock-brokers cannot be bound by all the usages of the market is shown by the case of *Harris v. Tumbridge*, recently decided in the courts of New York. The defendant was a broker and dealer in stocks in New York, doing business under the name of Tumbridge & Co. During the year 1877, circulars were widely distributed by the defendant, describing methods of speculating in stocks, with alluring accounts of the profits likely to be realized. One of these circulars reached a Miss Harris, living at a distance from the city. It recommended the purchase of "straddle contracts" as the safest form of speculating. In Wall Street parlance, a "straddle" is a contract by which an operator engages with a speculative customer that he will, during a specified time, either sell or buy, as the customer may elect, shares of a specified stock, at a price named. For this privilege of electing to buy or sell, the customer pays a round sum down. The theory is, that if the stock mentioned in the contract falls, the customer can make a corresponding profit by virtue of the right to sell at the old and higher price; if it rises, he will likewise make a profit by virtue of his right to buy at that price. If it neither rises nor falls, the operator pockets the bonus which, at the beginning, was paid for the privilege. The circulars of Tumbridge & Co. contained an

<sup>1</sup> *Stewart v. Cauty*, 8 Mee. & W. 160; *Stewart v. Aberdoin*, 4 Mee. & W. 211.

<sup>2</sup> *Wells v. Bailey*, 49 N. Y. 464.

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explicit guaranty "that, in a stock we select, the fluctuations will aggregate at least eight per cent on a sixty-day contract, costing \$400; and in case this does not occur, we will guarantee no loss except commission." Miss Harris was willing to make a venture of the kind described, and she sent to Tumbridge & Co., in a letter pointedly referring to and relying on the guaranty, \$425 to be invested for her. They answered, apprising her that they had purchased for her account a straddle contract on Lake Shore and Michigan Southern Railroad stock. Miss Harris thereupon awaited the expected rise or fall, either of which was to bring her a profit against her \$425 expended. The stock did rise somewhat more than ten per cent; and according to the plaintiff's understanding of the engagement, she should have received a remittance of about \$700 net profit. Instead of this, the broker sent her word that just after buying the straddle he had sold one hundred shares short against it, and that on account of this the speculation had resulted disastrously, leaving her indebted to him \$9. The defendant claimed that he had acted in accordance with a custom among brokers to use a straddle in such way, but did not pretend that the plaintiff had any personal knowledge of such custom, or had ever given any consent. The latter did not dispute the custom, nor that the step taken might have been judicious and fair, if done with the customer's knowledge, but took the simple position that the defendant could not, upon any pretext of usage of brokers unknown to her, depart from the contract indicated by the letters. On this ground she sued for damages for the defendant's violation of his duty as broker, and recovered judgment. On appeal to the Court of Appeals, the judgment was affirmed in her favor. So, in a very recent case in Nevada (*Marye v. Strouse*), a broker sued his customer for a balance of account which included a large charge for "telegrams." The latter said he had expected to pay the cost of any telegrams needful in executing his order, but the charge made was exorbitant. The broker answered that it was "the custom of brokers" to embrace in one message all the directions needed to be given in behalf of all the customers whose business was active at the moment, and to charge each customer seventy-five cents, — the rate for ten words, — which is what his message must have cost if sent separately, though perhaps two or three times as much as its share of a long message combining many directions. The court held that a broker cannot sustain charges for nominal disbursements, not actually made, by pretext of a custom, unless he can prove the custom to have existed so long and become so notorious that his employer must be supposed to have known about it when he gave his order.<sup>1</sup>

§ 21. Customs of Servants of Corporations. — A usage of the servants of a corporation, not shown to have come to the knowledge of the governing officers of the corporation, does not bind it.<sup>2</sup> Yet the necessary notice need not be express, but may be implied from the notoriety of the particular custom. *The*

<sup>1</sup> Neither of these cases has been yet reported. I am indebted for their facts and decisions to Mr. Benjamin Vaughan Abbott and an article from his pen in the *Bankers' Magazine* for April, on the Usages of the

Stock Market. *Harris v. Tumbridge* is reported in the court below in 8 Abb. N. C. 291.

<sup>2</sup> *Johnson v. Concord R. Co.*, 46 N. H. 213; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432.

## Corporations—Customs of Servants.

*Commonwealth v. Ohio and Pennsylvania Railroad Company*,<sup>1</sup> decided in the Supreme Court of Pennsylvania in 1856, illustrates this rule. The action was brought against the defendants to recover a penalty imposed by a statute for paying out bank-notes of a less denomination than five dollars. The notes on which the action was based were passed by the conductors and ticket-agents of the company, in their cars and ticket-offices, in the course of their employment in giving change for notes of a larger denomination received by them in the payment of fare on the road. On the trial, the plaintiff offered to prove that it was the open and notorious custom of the company's conductors and agents to issue and pay out the prohibited notes; but this evidence was rejected, and the defendants had a verdict. But the Supreme Court held that the evidence should have been received, and remanded the case for a new trial. "The question," said BLACK, J., "is whether the railroad company is liable for the acts of the ticket-agents and conductors. I concur fully in the opinion that the defendants are not liable under the statute unless the notes were paid out by the corporation. The corporation did not pay out the notes unless the officers immediately chosen by the stockholders to manage the affairs of the company either passed them away with their own hands, or else authorized their subordinate agents to do so. A servant of the corporation who does an act forbidden by law is responsible for it in his own person, and the corporation is not presumed to have given him any authority for such an act. It is very clear from this that where a conductor pays out an illegal note in change to a passenger, the penalty cannot be recovered from the company without proof that he had the authority of the president, directors, or treasurer, or some of them. But is it necessary that this proof should come in any particular form? Will nothing do but a solemn resolution of the directors, in full meeting assembled? May it not be inferred from circumstances? Surely it may. In the present case, the offer was to prove not only that a large number of small notes was passed upon two persons in the course of a short time, but that it was the open and notorious custom of (as we understand it) all the ticket-agents and conductors employed by the defendants to issue notes of a similar character. Now, what is the natural presumption from this? May a jury infer that the superior officers of the company knew of the custom and approved of it? Or must the court, as a matter of law, determine, without submitting it to a jury, that all the conductors and agents were habitually violating the orders of their masters as well as an act of the Legislature? It is for the jury to say what is the natural presumption which arises out of such facts, and there is no rule of policy which requires us to make any legal or fictitious presumption on the subject. I will not say what verdict ought to be given on such evidence, but I am very clear that no man who is not a juror in the case has a right to decide that the president and directors were ignorant, and therefore innocent, of a custom which was open, public, and notorious. If a corporation cannot be held responsible for the acts of agents and servants without proof of express authority beforehand, or distinct ratification afterwards, then the law upon which these defendants are sued, as well as a great many other laws, must remain a dead letter. The managers of a railroad company may cause any statute to be violated by their subordinates without giving orders which are capable of direct proof. The treasurer takes

<sup>1</sup> 1 Grant Cas. 329.

## Interest.

from the ticket-agent all the gold and silver he has collected, and leaves him small bills in place of it; the agent would understand the exact meaning of such a hint. The president passes along the road and sees all his conductors paying out the forbidden paper, without censure or disapproval; the habit is as sure to be continued as if he had told them to go on. If these bills had been passed in a few instances, by one or two of the company's servants, it would not be enough. But it seems to have been a general habit for a long time, until it became a notorious thing. The managers ought to be presumed to know at least as much about the conduct of their agents as was known to anybody else. If they knew of this, and yet suffered it to go on, the agents could not but know that they had the approbation of their superiors; and if they had, the corporation is responsible."

§ 22. **Customs of Merchants to charge Interest.** — Speaking of a custom of merchants to charge interest on unliquidated accounts after a certain credit, it was said by MARCY, J., in a New York case, decided in 1830: "The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings are supposed to act with reference to that custom."<sup>1</sup> This is scarcely a correct statement of the rule, and the facts in the case did not call for this opinion, as the proof showed notice to the defendant of the alleged custom.<sup>2</sup> In *Wood v. Hickok*,<sup>3</sup> decided by the same court a year earlier, where there was no evidence that the defendant knew of the custom of the plaintiff to charge interest, and no charge of interest had ever been made in any of the accounts rendered the defendant, except in the last, on which the suit was brought, it was held that the custom could not bind him. Similarly, in a case in the same year and in the same court, where interest on charges for storage and wharfage were claimed by virtue of a usage, the court refused to allow it, no proof being given that the defendant knew of the usage.<sup>4</sup> Yet a similar usage prevailed three years later, on the ground that in that case "it was the uniform custom of all those engaged in the same business to charge interest. It was the custom of the plaintiff to charge it; he had charged it in former accounts against the defendant, and it had been paid without objection, before the contract was made on which this suit was brought."<sup>5</sup> This last extract states the proper test, though it is, of course, not absolutely required that the party sought to be charged should have paid previous demands of interest in order to raise the presumption that he has notice of the custom in a later case. But it is requisite that some evidence, either of its extensive notoriety or of the party's dealings having brought him into contact with the custom, should be added to the bare proof that such is the custom of the particular dealer, or of the trade in general. This statement will be found to be supported by the best considered of the authorities on the point.<sup>6</sup>

<sup>1</sup> *McAllister v. Reab*, 4 Wend. 483.

<sup>2</sup> See *s. c.* on appeal, *Reab v. McAllister*, 8 Wend. 109.

<sup>3</sup> 2 Wend. 501.

<sup>4</sup> *Trotter v. Grant*, 2 Wend. 413.

<sup>5</sup> *Meech v. Smith*, 7 Wend. 315.

<sup>6</sup> See, in addition to the cases cited *supra*, *Esterly v. Cole*, 3 N. Y. 502; *Liottard v.*

*Graves*, 3 Caines, 216; *Fellows v. Mayor of New York*, 17 Hun, 249; *Fisher v. Sargent*, 10 Cush. 250; *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307; *Barclay v. Kennedy*, 3 Wash. C. Ct. 350; *Loring v. Gurney*, 5 Pick. 15; *Turner v. Dawson*, 50 Ill. 85; *Goodnow v. Parsons*, 36 Vt. 47; *Langdon v. Town of Castleton*, 30 Vt. 236; *Birchard v. Kuapp*, 31

## Knowledge — When Essential.

§ 23. *Customs of Banks.* — In a few cases it is said that in order to affect a person with a usage of a particular bank it is necessary to show that he was conversant with it.<sup>1</sup> But these decisions are not law. In *Mills v. Bank of the United States*,<sup>2</sup> it was expressly ruled by the Supreme Court, following *Renner v. Bank of Columbia*,<sup>3</sup> that where a note is made for the purpose of being negotiated at a bank whose custom is to demand payment and give notice on the fourth day of grace, that custom binds the parties. And it was said: "In the present case, the court is called upon to take a step further; and, upon the principles and reasoning of the former case, it has come to the conclusion that when a note is made payable or negotiable at a bank whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable." Many other cases lay down the rule that a usage of a bank is binding on persons dealing with it, whether known to them or not.<sup>4</sup> All that is required is, that it shall have been so long established that its customers may well be presumed to have known of it. Less than this, however, will not do; and so, where a certain practice had been adopted by a bank but two years, and in that time only four instances under it had occurred, it was held, in the Supreme Court of the United States, that the requisite notoriety was wanting.<sup>5</sup>

§ 24. *Customs of particular Trades and Professions.* — If there is a general usage applicable to a particular profession or business, parties employing an individual in that profession are supposed to deal with him according to that usage.<sup>6</sup> "All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes a part of it, except when its place is occupied by particular stipulations."<sup>7</sup>

It is held in some cases that where services are rendered, and a uniform usage is shown in regard to such services, it will be presumed that they are rendered in accordance with the usage. In the following instances, the usage being proved, it was held not material that the proof did not show, in addition, that the party to be affected by it had express notice of it: In an action by S., a veterinary surgeon, against C., for attendance and medicine furnished to C.'s horse, a custom to pay veterinary surgeons for attendance as well as medicines;<sup>8</sup> in an action by a dry-goods salesman against his employer for a wrongful dis-

Vt. 679; *Wood v. Smith*, 23 Vt. 706; *De Hertel v. Supple*, 13 Upper Canada Ch. 648; 14 Upper Canada Ch. 421.

<sup>1</sup> *Pierce v. Butler*, 14 Mass. 309.

<sup>2</sup> 11 Wheat. 431.

<sup>3</sup> *Post*, Chap. III.

<sup>4</sup> *Dorchester, etc., Bank v. New England Bank*, 1 Cush. 177; *Bank of Washington v. Triplett*, 1 Pet. 25; *Yenton v. Bank of Alexandria*, 5 Cranch, 49; *Bank of Columbia v. Fitzhugh*, 1 Har. & G. 239; *Smith v. Whiting*, 12 Mass. 6.

<sup>5</sup> *Adams v. Otterback*, 15 How. 539.

<sup>6</sup> *Sewell v. Corp.*, 1 Car. & P. 392; *Given v. Charron*, 15 Md. 502; *Lyon v. George*, 44 Md. 295; *Vaughn v. Gardner*, 7 B. Mon. 326; *Walls v. Bailey*, 49 N. Y. 464; *Ford v. Terrell*, 9 Gray, 401; *Lowe v. Lehman*, 15 Ohio St. 179; *Barton v. McKelway*, 22 N. J. L. 165; *Carter v. Philadelphia Coal Co.*, 77 Pa. St. 286.

<sup>7</sup> *Pittsburg v. O'Neill*, 1 Pa. St. 343.

<sup>8</sup> *Sewell v. Corp.*, 1 Car. & P. 392.



## Customs of Particular Trades.

missal, a custom among dry-goods jobbers that when a clerk or salesman begins a season without a special contract, he cannot be dismissed until the end of it;<sup>1</sup> in an action against a glass-ware manufacturer by an agent, for commissions, a usage among manufacturers of glass-ware to allow their local agents commissions both upon goods ordered directly through such agents and upon goods ordered by buyers living in the territory of the agent directly through the manufacturer.<sup>2</sup>

The customs and regulations of employers requiring notice of intention to leave the master's service must, in order to affect the servant, be shown to have been known by the latter at the time of entering the service. On this ground the usage set up in the leading case of *Stevens v. Reeves*<sup>3</sup> was rejected. The usage was that no person employed in a woollen-factory should leave without giving a fortnight's notice of his intention, and the defendant, a weaver, did not know of the usage. In a Scotch case,<sup>4</sup> it was ruled that if a servant has been hired from Whitsunday to Martinmas, and is dismissed at Martinmas without warning, it is not relevant to her claim for wages during the subsequent term that by local usage no warning is given, unless the usage be notorious. Notice of the employer's regulations is not sufficiently brought home to the employee by merely placing in his hands a printed copy of such regulations, unless it is shown that the employee can read. The law will not presume that he can read, but imposes the burden of proving that fact on the party to be benefited.<sup>5</sup> If the servant does not know of the usage, and is not informed of it when he begins work, the fact that he is afterwards informed of it, and continues to work without objection, does not conclusively show such assent, though it may be evidence thereof.<sup>6</sup>

In many cases no distinction is made between a local and a general custom, or a custom established by time and a custom of but short duration, in the particular trade. Doubtless the cases did not call for this. But the rule is best stated with the qualification that it must have been so well established and notorious as to properly raise a presumption that it must have been, or ought to have been, known to the parties sought to be bound by it.<sup>7</sup> Where both parties are engaged in the same particular business, and the usage relates to the technicalities of their calling, it will ill become one of them to profess ignorance of it, and such a plea would find little favor with the courts. So, too, where the one to be charged with the usage, though not of that calling, yet has dealings with it, the presumption would still be violent that he knew of the usage, provided only it had been in existence for a sufficient length of time for him to have gained knowledge of it. If a party closes his eyes and shuts his ears to what is universally known in his community by others, he will not be allowed to shelter himself under a plea of ignorance.<sup>8</sup>

<sup>1</sup> *Given v. Charron*, 15 Md. 502.

<sup>2</sup> *Lyon v. George*, 44 Md. 295.

<sup>3</sup> 9 Pick. 198, *ante*, p. 7.

<sup>4</sup> *Morrison v. Allardye*, 2 Scotch Sess. Cas. 387; *Marhan v. Elliott*, Hume, 393.

<sup>5</sup> *Bradley v. Salmon Falls Man. Co.*, 30 N. H. 487. And see *Harmon v. Salmon Falls Man. Co.*, 35 Me. 447.

<sup>6</sup> *Collins v. New England Iron Co.*, 115 Mass. 23.

<sup>7</sup> *Flynn v. Murphy*, 2 E. D. Smith, 378.

<sup>8</sup> *Lowe v. Lehman*, 15 Ohio St. 179; *Wells v. Bailey*, 49 N. Y. 464; *Queen v. Inhabitants*, 5 Q. B. 303; *Wilson v. Bauman*, 80 Ill. 493.

## Insurer and Insured.

§ 25. **Particular Customs not known to Insured inadmissible.** — A custom of a particular insurer which is unknown to the insured is not admissible to affect his rights.<sup>1</sup> In an action against the *Dorchester Fire Company*, the evidence of its agent that it was its custom to charge extra premiums on unoccupied dwelling-houses;<sup>2</sup> in an action against the *Ætna Life Company*, evidence of a usage on its part to require, as proof of death, a certificate from the deceased's attending physician;<sup>3</sup> in an action against the *Globe Fire Company*, evidence of a usage at New York, in case of the occurrence of any circumstance by the act of the insured after affecting the insurance, whereby the risk is increased, for the insured to give notice thereof to the insurer, who is then to have the option of continuing the policy or of annulling it;<sup>4</sup> in an action against the *Washington Fire Company*, evidence of a usage in the office of the company that the term "carpenters," in a policy referred to the employment and work of carpenters in erecting or adding to buildings insured;<sup>5</sup> in an action against the *Protection Fire Company*, evidence of a local usage among insurers in the county where the property destroyed was situated, to reject an application for insurance on a building which had previously been fired by an incendiary, or to charge a higher premium thereon;<sup>6</sup> in an action against the *Illinois Fire Company*, evidence of a usage in their office to require notice of additional insurance to be given by the insured;<sup>7</sup> in an action against the *Germania Life Company*, a custom of the company not to deliver or send policies to agents for delivery except upon the condition that the person whose life was insured was in good health;<sup>8</sup> in an action against the *New England Fire Company*, the testimony of the president as to the practice of the company in requiring applications for consent to additional insurance to be in writing;<sup>9</sup> in an action against the *Hibernia Fire Company*, evidence that the words "standing detached," in a policy, meant, "among insurance men generally," that the subject of insurance should be at least twenty-five feet from external exposure;<sup>10</sup> in an action against the *American Marine Company*, a usage of the company to require a survey of the goods damaged by the port-wardens, as a preliminary proof of the loss;<sup>11</sup> in an action against the *Niagara*

<sup>1</sup> *Carter v. Boehm*, 3 Burr. 1905.

<sup>2</sup> *Luce v. Dorchester Ins. Co.*, 105 Mass. 399.

<sup>3</sup> *Taylor v. Ætna Life Ins. Co.*, 13 Gray, 434.

<sup>4</sup> *Stebbins v. Globe Ins. Co.*, 2 Hall, 632.

<sup>5</sup> *Washington Fire Ins. Co. v. Davison*, 30 Md. 91.

<sup>6</sup> *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452.

<sup>7</sup> *Illinois Mutual Ins. Co. v. O'Neill*, 13 Ill. 89. In this case the Supreme Court of Illinois excluded evidence of the usage offered, on the ground that it would modify or contradict the contract between the parties, *Caton, J.*, saying: "The usage of the company in regard to additional insurance upon personal property \* \* \* was properly excluded. No usage of the company, nor even the express agreement of the parties, whether made previous to or at the time of the execution of the policy, can be admitted to explain, modify, or control the

written contract." But there was nothing in the contract in question providing that such notice should not be given. Had the usage been a general one, and known and understood by the insured as a part of his contract, though not incorporated therein, it would have been admissible in accordance with the rule that the usages of trade are part of the contract, whether expressed in it or not, provided they are not excluded or are not illegal. The usage in question was purely a local one, and was not shown to have been known to the plaintiff. It was, therefore, rightly rejected, but not for the reasons given by the court.

<sup>8</sup> *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448.

<sup>9</sup> *Goodall v. New England Fire Ins. Co.*, 25 N. H. 169.

<sup>10</sup> *Hill v. Hibernia Ins. Co.*, 10 Hun, 26.

<sup>11</sup> *Rankin v. American Ins. Co.*, 1 Hall, 619.



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Knowledge — When Requisite.

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Fire Company,<sup>1</sup> a usage of the company as to the mode of adjusting losses — all these have been held inadmissible in evidence for the purpose of affecting the rights of the insured.

§ 26. **And so of particular Customs not known to Insurer.** — For like reasons, where a fire-policy on a factory was construed to engage that a watchman should be kept in the building through the hours of every night in the week, a usage of the factory for the watchman to leave at twelve o'clock on Saturday night, and not to return until twelve o'clock on Sunday night, was held not to affect the breach.<sup>2</sup> So, where a marine policy issued at Rockland, Maine, contained a warranty that the vessel should not enter the river and Gulf of St. Lawrence between September 1st and May 1st, and she was lost in the Strait of Northumberland, placed by geographers as within the gulf, in December, a usage at Boston not to regard the strait as within the gulf was not admitted. "A usage," said the court, "may be local or general. But if local, the contracting parties are not bound by the usages of other places, unless they are referred to or made part of the contract. It is immaterial what may be the usage or the construction given to particular words at Boston; they will not affect a contract at Rockland, unless a similar usage or the same construction to the same words is shown to exist there if the contract is there made. The usage must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume the parties had knowledge of it, or that they were bound to be informed of it."<sup>3</sup>

§ 27. **Knowledge of Custom — When not presumed.** — As we have seen, if A. makes a contract with B. in any particular trade or business, both A. and B. are presumed to contract with reference to any customs of that trade which may affect their rights *inter se*. A custom cannot affect parties between whom there is no privity of contract. In *Dunn v. City of London Brewery Company*,<sup>4</sup> a tavern-keeper deposited the lease of his house with the defendants, brewers, with a memorandum stating that the deposit was to secure payment of the sum of £200, as well as any other sums in which the depositor might become indebted to the brewers on any account not exceeding £500. The brewers subsequently made a further advance of £100. Four days thereafter the tavern-keeper gave the plaintiffs, who were distillers, a memorandum declaring that the documents deposited with the brewers should, subject to the brewers' charge, be a security to the distillers for the sum of £120 then due them, and all other sums that might thereafter become due them. Notice of this second equitable mortgage was on the same day given by the distillers to the brewers, and afterwards the tavern-keeper became indebted to the brewers in a further sum of money for beer supplied to him. On the trial of an action to determine the priorities, the brewers claimed to be entitled, by virtue of a custom in the trade between brewers and tavern-keepers, to add the last sum due them to the amount secured

<sup>1</sup> *Williams v. Niagara Ins. Co.*, 50 Iowa, 561.

<sup>2</sup> *Glendale Man. Co. v. Protection Ins. Co.*, 21 Conn. 19.

<sup>3</sup> *Cobb v. Lime Rock, etc., Ins. Co.*, 58 Me. 326.

<sup>4</sup> L. R. 8 Eq. 155. And see *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

## Illustrations.

by the deposit of the lease, in priority to the distillers' charge. But JAMES, V. C., rejected the custom, saying: "It is difficult to apply such a custom to persons who are entering into no contract between themselves — who have only this connection: that they are suppliers of a common customer. We know how persons on the Stock Exchange, dealing with one another, are affected by the *lex loci*. There is supposed to be introduced into the contract the usage and practice of the Stock Exchange, which is known to both of the contracting parties, and that is taken as part of the contract. One can understand how, when a landlord lets his land to a tenant, the custom of the country as to crops and allowances to outgoing tenants may be introduced as part of the contract between landlord and tenant; but it is very difficult to see how anything of the kind can be applied to persons who have no privity of contract, who do not contract at all with each other, but who are persons who have only the misfortune, or the good fortune, to be creditors of the same person. It seems to me very much as if a custom were alleged in these terms: that if a citizen of London and a burgess of Southwark were both creditors of a trader, the citizen of London might say, 'There is a custom by which my debt must be paid first, in priority to yours.'"

The custom of others to do certain acts cannot support a similar act done by a party who was himself ignorant of any such custom, and whose actions, therefore, could not have influenced his conduct in the least. Thus, in *Kinne v. Ford*,<sup>1</sup> an action was brought to recover the value of a check for \$10,000 in gold, which the plaintiffs alleged was delivered by their clerk to the defendants' clerk. The defendants denied its receipt. The plaintiffs' clerk testified that he delivered the check in question, that he took no receipt for it, and did not get the defendants' check for currency for the amount of the check he had delivered. Upon the question of the delivery or non-delivery of the gold check, the plaintiffs were permitted to prove that other persons who were late in their delivery of checks payable in gold were sometimes accustomed to leave the checks, and take no checks for currency in payment until afterwards. The clerk, it appeared, had no knowledge of such a custom. The admission of this evidence was held to be error. "The witness," said the Supreme Court, "knew of no such custom, had delivered no gold check before this one, as he could remember, and did not pretend that this custom was the reason of his taking no check for the one he delivered. The question was, Did he deliver this check in the manner and at the time he testified he did? It was not legitimate or proper evidence upon this issue that persons about whose deliverances of stock no question is made were sometimes accustomed to deliver checks and received neither evidence nor payment, when such custom was neither known to the witness nor stated by him as a reason why he omitted to take either receipt or payment."

A usage of a bank cannot bind a party who has no occasion to believe that he will be brought within its operation, or does not intend to be. Therefore, where an indorsed check was drawn on a bank at A., was cashed at a bank at S., and forwarded thence to the bank at A. for collection, any customs between the bank at S. and the bank at A. were considered irrelevant, since there was "no pretence that this check was drawn or indorsed with a view to its being negotiated or

<sup>1</sup> 52 Barb. 194.

## Knowledge — How Requisite.

cashed at the bank at S., or that there was any usage from which the defendant had reason to suppose it would be collected through that bank."<sup>1</sup> *Lime Rock Bank v. Hewett*<sup>2</sup> is a still better example of this rule. Two notes, one made payable at the Lime Rock Bank and the other not so payable, were indorsed by the defendant, who lived in the same town, and notices of dishonor were sent to him by post, according to the custom of the bank. The court held that as to the note payable at the bank the notice was good, and the defendant was bound; but as to the other, he was not bound. "Where the parties to a note or bill of exchange live in the same town," said APPLETON, C. J., "a demand upon the maker and notice through the post-office are not sufficient to charge the indorser. \* \* \* The larger note in suit was payable at and transferred by the defendant to the bank. By indorsing a note thus payable he may well be presumed, knowing the usages of the bank, to have assented to, and to have agreed to be bound by them. \* \* \* But the note for \$300 was not made payable at any bank. There was no proof that the defendant knew that it would, or assented that it should be discounted by the plaintiffs. He is not the last indorser. Nor is he, by the mere fact of a prior indorsement, to be presumed to have waived, as to this note, the usual notice of demand and non-payment. Notice through the post-office would not be binding upon him." So, it cannot be presumed that a person has knowledge of the customs of banks at places distant from that in which he himself lives and does business.<sup>3</sup> And though dealers with a "clearing-house" will be bound by its usages, they cannot bind persons not parties to the association.<sup>4</sup> It was held in *Kirchner v. Venus*<sup>5</sup> that persons living in Sydney, Australia, would not be presumed to be acquainted with a mercantile usage existing at Liverpool.

§ 28. **Person ignorant of a Usage cannot take Advantage of it.** — A usage is equally inadmissible if it can be shown to have been unknown, at the time of the contract, to the party setting it up and seeking its benefits, for in such a case there would be no presumption that the contract was made with reference to it.<sup>6</sup>

§ 29. **Proof of Knowledge by a single Instance.** — Though a single instance of a certain practice will not prove a usage, yet it is sufficient to bring home notice of such a usage, already established, to a person sought to be bound by it.

§ 30. **A Custom must be Moral.** — A custom must be moral; that is to say, it must not be of doubtful morality.<sup>7</sup> There was a custom which prevailed in Scotland in olden times that gave to the lord of the fee the right of concubinage with his tenants' wives on their wedding-nights.<sup>8</sup> Though it is denied that this custom ever flourished in England,<sup>9</sup> there is no doubt that such a right was never

<sup>1</sup> *Mohawk Bank v. Broderick*, 13 Wend. 133.

<sup>2</sup> 52 Me. 51.

<sup>3</sup> *Morse on Banks*, 438; *Bank of Washington v. Triplett*, 1 Pet. 25.

<sup>4</sup> *Overman v. Hoboken City Bank*, 30 N. J. L. 61.

<sup>5</sup> 12 Moo. P. C. C. 361.

<sup>6</sup> *Nonotuck Silk Co. v. Fair*, 112 Mass. 354. And see *Fowler v. Pickering*, 119 Mass. 33.

<sup>7</sup> *Dorchester, etc. Bank v. New England Bank*, 1 Cush. 177.

<sup>8</sup> *Wellman v. Nutting*, 3 Mass. 434.

<sup>9</sup> 2 Bla. Comm., chap. 6, p. 83.

<sup>10</sup> *Gerald's Case*, 23 How. St. Tr. 1407, note.

## The Custom of "Bundling."

claimed in the courts; for, had it been, it would certainly have been held bad on account of its immorality. In America we find a trace in the reports of a custom equally curious, though less shocking, which grew up in the austere society of early New York. In "Knickerbocker's History of New York" we have the following explanation of the causes which prevented a decrease of population in spite of the persecutions, and burnings, and hangings of Quakers and witches: "But, notwithstanding the fervent zeal with which this holy war was prosecuted against the whole race of unbelievers, we do not find that the population of this new colony was in anywise hindered thereby; on the contrary, they multiplied to a degree which would be incredible to any man unacquainted with the marvellous fecundity of this growing country. This amazing increase may, indeed, be partly ascribed to a singular custom prevalent among them, commonly known by the name of 'bundling,' a superstitious rite observed by the young people of both sexes, with which they usually terminated their festivities, and which was kept up with religious strictness by the more bigoted part of the community. This ceremony was likewise, in those primitive times, considered as an indispensable preliminary to matrimony,—their courtships commencing with ours usually finish,—by which means they acquired that intimate acquaintance with each other's good qualities before marriage which has been pronounced by philosophers the sure basis of a happy union. Thus early did this cunning and ingenious people display a shrewdness of making a bargain which has ever since distinguished them, and a strict adherence to the good old vulgar maxim about 'buying a pig in a poke.' To this sagacious custom, therefore, do I chiefly attribute the unparalleled increase of the Yanokie or Yankee race; for it is a certain fact, well authenticated by court records and parish registers, that wherever the practice of 'bundling' prevailed, there was an amazing number of sturdy brats annually born unto the State without the license of the law or the benefit of clergy. Neither did the irregularity of their birth operate in the least to their disparagement. On the contrary, they grew up a long-sided, raw-boned, hardy race of whoreson whalers, wood-cutters, fishermen, and peddlers, and strapping corn-fed wenches, who, by their united efforts, tended marvellously towards peopling those notable tracts of country called Nantucket, Piscatanay, and Cape Cod."

*Seagar v. Sligerland*,<sup>1</sup> which arose in New York in 1804, seems to have been the first case in which the custom of "bundling" engaged the attention of the courts. Its result was followed in a Pennsylvania case in 1845. In this case, which was also an action for seducing the plaintiff's daughter, the daughter, being called as a witness on the trial, testified that she was twenty-three years old, and single; she had a child, of which the defendant was the father, and which was about a year old; she lived with her father when her child was begotten, and when it was born; her mother was deceased, and she kept house for her father; she had been at a battalion training, and the defendant went home with her; they took supper, and very soon went to bed together; the child was begotten that night, but the defendant was there twice afterwards, and slept with her both times. This, she further testified, was according to the custom of the country, and her father knew of it, and knew that the defendant was

<sup>1</sup> *Ante*, p. 9.

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sleeping with her on the night of the battalion training. Her father was not in the same room with them, but he saw her in bed with the defendant. The girl's brother was then called, and testified that he saw the defendant at his father's house on the night of the battalion training, and that he saw the defendant and his sister in bed together on that night. A number of other witnesses were called, and spoke to the good character of the plaintiff and his family, and of his daughter except in this matter. The judge, after stating to the jury the grounds of the action for seduction, said: "This action is always founded on a wrong done by the defendant, and as regards the will and consent of the father, the daughter is supposed to be violated with force. It is this absence of consent on his part, this violation of his daughter's chastity against his will, that entitles him to sustain his action for a compensation in damages. When the criminal intercourse has been had with his knowledge and under his connivance, he would seek redress with but an ill grace indeed. He would not actually be a *particeps criminis*, but in want of decency and in breach of parental duty he would approach very near to it. His indifference to his daughter's morals and chastity would meet with but a just retribution in her misfortune and disgrace. The fault would be as much his own as her's or her seducer's; and his assurance in coming to court to ask for a reward for the perpetration of a wrong which was known to him, and which he might have prevented, would justify the belief that he had no objections to its commission." As regards the custom set up to excuse the plaintiff's neglect, the judge said: "Much has been said by the plaintiff's counsel about the custom in courtship which he has denominated 'bundling.' He has said that this custom prevails very generally in the part of the country where these parties reside. This may be so, but I am unwilling to believe it. If it is so, it is time the custom should be abolished. Even if this custom does prevail, it furnishes no excuse for the plaintiff's carelessness or his daughter's indiscretion. If it be any excuse, it would extend equally to all concerned, and the defendant might claim his portion of protection under it also. The plaintiff has by this time, I apprehend, found out that this custom is dangerous, at least, if he does not feel that it is indecent. A man who takes no pains to abolish this custom in his own house has no right to complain of consequences which most naturally follow." The jury returned a verdict for the defendant.<sup>1</sup>

*Holmes v. Johnson*,<sup>2</sup> decided in the Supreme Court of Pennsylvania in 1862, illustrates this rule in another phase. The case was an action of ejectment growing out of a disputed title to land, the plaintiff being a negro born in another State, and the defendant, in order to rebut the presumption of marriage and legitimacy from cohabitation, offered to prove that in the region from which the negro came—the eastern part of Maryland—it was not the custom for colored people to form legal marriages;<sup>3</sup> that marriage among them was the exception, and not the rule; that the majority of them cohabited promiscuously, and that this mode of promiscuous cohabitation was the custom there among free colored persons as well as slaves. This evidence, it was held, was properly rejected. "A custom, however ancient," said READ, J., "if contrary to morality, religion, and the law of the land, cannot be a legal one, and it is clearly

<sup>1</sup> *Hollis v. Wells*, 3 Pa. L. J. 169.

<sup>2</sup> See *Jackson v. Lervey*, 5 Cow. 402.

<sup>3</sup> 42 Pa. St. 159.

## The Charivari.

unreasonable, and cannot be compulsory. Tried by this standard, the rejection of this offer to prove such a custom, so contrary to the moral sense of a Christian community, was eminently proper. We have never heard of such a custom being attempted to be proved in England."<sup>1</sup>

In a North Carolina case, a prosecution for adultery, there was evidence that in a playful scuffle between the parties, in the presence of the defendant's wife and others, the woman fell, or was pulled, into the defendant's lap. The State insisted that such familiarity was evidence of guilt, to which the defendant replied that while this might be so in high life, yet such acts of familiarity were common in that section among plain people, such as the defendants were, and that they were regarded as innocent sport. The court having left it to the jury to say whether or not such acts were customary, the defendant was convicted, and on appeal the Supreme Court expressed its sympathy with the "indignation and horror" of the trial judge at the attempt to set up so immoral a custom.<sup>2</sup>

But, where adultery is sought to be proved by circumstantial evidence, as by proof of the disposition of the persons charged and the opportunity to commit the act, it seems clear that the social habits and customs of the parties, and of the community in which they reside, are relevant.<sup>3</sup> As said in an English case: "It is manifest that the opinions of mankind may vary very much as to the circumstances from which the inference of adultery is to be drawn. The opinions of the jury may depend upon the sort of society in which they have lived — whether they were accustomed to associate with people who were strict and careful, or with people who were free and easy and somewhat careless in their conduct. One set of men may think that if a married woman indulges in any improper familiarity with a man, she would be likely to commit adultery; whilst another set may think that a great degree of license may exist, and yet that a woman would stop short of committing the great offence."

Another American custom of doubtful morality is the *charivari*, a word which Dr. Johnson's Dictionary does not contain, but which is defined by Webster thus: "A mock serenade of discordant music, kettles, tin horns, etc., designed to annoy and insult. It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult." It is not surprising to find that the courts have not been eager to indorse this practice, nor that in two instances, at least, it has been unprofitably advanced as an excuse for certain illegal acts. In Pennsylvania, in 1796, Samuel Lewis, Charles Hobbes, Isaac Hobbes, Nathan Lewis, and Isaac Braden were indicted for the murder of John Weston. On the 5th of the previous November there was a wedding at Weston's house, to which the prisoners went, though only one of them was invited. Weston, who was

<sup>1</sup> The opinion also refers to certain immoral customs in London, citing from the *London Quarterly Review* of April, 1861: "We could name entire quarters in which it seems to be a custom that men and women should live in promiscuous concubinage; where the most frightful debauchery goes on, night and day, in the lowest public

houses; where the very shopkeepers make a profession of atheism, and encourage their poor customers to do the same."

<sup>2</sup> *The State v. Butner*, 76 N. C. 118.

<sup>3</sup> *Inskeep v. Inskeep*, 5 Iowa, 204; *Berkmans v. Berkman*, 16 N. J. Eq. 122; 17 N. J. Eq. 453; *King v. King*, 4 Scotch Sess. Cas. 583.

<sup>4</sup> *Gothin v. Gothin*, 2 Sw. & Tr. 560.



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Customs must be Peaceable.

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rather suspicious of them, told them that they were welcome if they behaved themselves; and everything went well until the evening, when, the guests being engaged in dancing in an out-house, the prisoners began to be troublesome, shoved the dancers off the floor, fought sham battles among themselves, and broke up the company. They stood in a row against Weston, who was an old man seventy-three years of age, and pushing one against another, forced him to the wall. Notwithstanding his protests, they continued to ill-use him for some time, he being frequently thrown to the ground in the scuffles that ensued, all the prisoners on one occasion falling on top of him. Weston afterwards left the out-house and went into his dwelling, shutting the door; but the prisoners came after him and burst it open, mocked him, pushed him and his wife off their chairs, and after leaving the house, threw stones through the windows and down the chimneys. The old man then went out to remonstrate, but the rioters knocked him down and kicked him. They continued there all that night and part of the next day. In the morning Weston complained of his hurts, and in the evening took to his bed, and died from their effects. On the trial, it was urged by the prisoners' counsel that they "did nothing more than a usual frolic, according to the customs and manners of the country. There was no intention of hurt, no design of mischief, in which the malice which is the necessary ingredient of murder consists." But the State attorney replied: "We have no custom in this country of killing old men at weddings. The Indians have a custom of killing one another when drunk; and if we indulge such practices as have appeared in this case, we shall soon be as barbarous as the savages of the wilderness." And the president of the court charged the jury that sport could not exclude the presumption of malice, and the prisoners were convicted of murder in the second degree.<sup>1</sup> Again: in Indiana, in 1853, Jesse Bankus, Lewis Simpson, William Woods, and William McShirely were indicted for riot, in having surrounded the house of one Jacob Wise, blowing horns, singing, and hallooing, to the disturbance of the neighborhood. The Supreme Court said: "It is urged that these defendants were but acting in accordance with the custom of the country. But a custom of violating the criminal laws will not exempt such violation from punishment." And the judgment of conviction was affirmed.<sup>2</sup>

§ 31. **A Custom must be Peaceable, and acquiesced in.**—A custom must have been peaceable, and acquiesced in, and not disputed at law or otherwise; for customs owe their origin to common consent, and this cannot be intended in disputed cases.<sup>3</sup> If it has been the subject of contention and dispute it has not recommended itself as expedient to all, and the fact that it has proved a convenience to some, is counteracted by the fact that it has also proved an inconvenience to many. But the non-consent of these is as powerful as the consent of those; and as customs, to be valid, owe their efficacy to common consent, the fact that they have been immemorially disputed proves that universal consent was wanting.<sup>4</sup> Notwithstanding a contrary *dictum* in an Alabama case,<sup>5</sup> it is settled, and upon good reasons, that a usage of trade must be

<sup>1</sup> The State v. Lewis, Add. 279.

<sup>2</sup> Bankus v. The State, 4 Ind. 114.

<sup>3</sup> Dane's Abr., chap. 26, art. 1, § 3; Archer v. Bokenham, 11 Modern, 161.

<sup>4</sup> Browne on Usages and Customs, 18.

<sup>5</sup> "It is not indispensable to the validity of a usage of trade that it should be universally acquiesced in; for this would be to annul all

## Illustrations.

generally assented to as well as asserted before it can be established; it must be acquiesced in by all persons acting within the scope of its operations.<sup>1</sup> Where it has been the subject of controversy and contention, claimed by one class and denied by another, and only submitted to under protest and to avoid litigation, it cannot be presumed to have been so acquiesced in as to have entered into and formed a part of the contract. A valid usage must be not only submitted to, but should receive at least the tacit acquiescence of all classes engaged in the trade which it is sought to affect and control.<sup>2</sup> Evidence offered to prove a custom on the part of carriers for an intermediate carrier to deduct from the freight earned by a prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, the prior carrier not being permitted to show that an error occurred in stating the amount in a bill of lading, was held, in a Michigan case, not sufficient to show the necessary acquiescence, *COOLEY, C. J.*, in his opinion, reviewing it in this language: "The testimony of witnesses shows that the question of shortage is frequently the subject of dispute. Capt. Elsie says: 'The custom is sometimes acquiesced in by the captains of vessels, and sometimes disputed. If the shortage is small, they generally pay it; if it is large, they generally dispute it, and leave it to be settled by the owners.' Mr. Stephenson, the general freight-agent of the defendants, says: 'I have known captains to refuse to pay the shortage, but we always have the freight in our own hands before we settle. We invariably refuse to pay the captains until the two principals are agreed.' Capt. Montgomery, after testifying that the custom is universal, says: 'I have known the question of shortage disputed at least a hundred times.' Several other witnesses give evidence that the custom is general, but the impression which the whole evidence leaves in our minds is, that the deduction of shortage is submitted to when the carrier concedes that it is his fault, or where the amount is not beyond what is usual and incident to transportation, but that it is disputed in other cases. A custom varying the common law must be clearly proved; but we do not find clear evidence in this case that ship-owners concede their liability to have deductions made from freight earned for the value of property receipted for by mistake. That the railway companies assert the right, is fully shown; but it must be generally assented to, as well as asserted, before the custom can be established."<sup>3</sup>

§ 32. **A Custom must be reasonable.**—The rule that a custom must be reasonable may be better stated negatively, viz.: a custom must not be unreasonable. An unreasonable custom is bad, and will not be recognized by the courts of law.<sup>4</sup> The words "not reasonable," as used in this connection, are,

customs as to those who were unwilling to abide by them. Instead of having the force of law and being of general obligation, they would depend for their operation upon the gratuitous assent of every person against whom they were invoked." *Desha v. Holland*, 12 Ala. 513.

<sup>1</sup> *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

<sup>2</sup> *Dixon v. Dunham*, 14 Ill. 324.

<sup>3</sup> *Strong v. Grand Trunk R. Co.*, 15 Mich. 206.

<sup>4</sup> *Rogers v. Brenton*, 10 Q. B. 26; *Hilton v. Granville*, Dav. & M. 614; 5 Q. B. 701; *Hix v. Gardiner*, 1 Bulst. 195; *Rex v. Gordon*, 1 Barn. & Ald. 524; *Bremner v. Hull, L. R.* 1 C. P. 748; 12 Jur. (N. S.) 648; *Wilkes v. Broadbent*, 1 Wils. 63; 1 Dane's Abr., chap. 26, art. 1, § 4; *Clayton v. Corby*, 5 Q. B. 415.



## Reasonableness.

according to Mr. BROWNE, to be understood in a legal sense; and in coming to a conclusion as to what customs are reasonable and what unreasonable, regard must be had to the legal decisions which have been made in times past upon cases involving similar questions; for "reasonable," says COKE, "is not always to be understood of every unlearned man's reason, but of the artificial and legal reason warranted by authority of law."<sup>1</sup> Therefore, a custom may be good though the particular reason of it cannot be assigned, for it suffices if no good legal reason can be assigned against it. A custom is not unreasonable merely because it is contrary to a particular rule or maxim of the common law; otherwise gavelkind and borough-English, which are directly contrary to the ordinary law of descent, or the custom of Kent, which is contrary to the law of escheats, would not be valid customs; indeed, it is the very essence of a custom that it should vary from the common law.<sup>2</sup> As we shall see hereafter, when we come to consider the validity of commercial usages which conflict with settled rules of law, a custom is not bad simply because it alters an established rule; yet, at the same time, there are certain rules of law which are founded on public policy, and which cannot be disturbed without injury to all concerned. Customs contrary to these rules are, therefore, invalid.<sup>3</sup>

§ 33. Customs beneficial to the Public Good, though injurious to some. — A custom is not unreasonable simply because it is injurious to private persons or interests, if it be for the public good. Examples of such customs may be seen in those which allow the pulling down of houses to prevent the spreading of a conflagration, and which permit one to turn his plough on the headland of another; the former may stop a great public calamity, the latter favors and promotes agriculture.<sup>4</sup> In this class fell the custom in *Voughton v. Atwood*,<sup>5</sup> for surveyors, duly chosen, to destroy corrupt victuals exposed to sale. Atwood and others were sued in trespass for taking away the meat of the plaintiff, who was a butcher. The defendants justified by virtue of a custom of the manor by which each year two surveyors were chosen to inspect the victuals sold within the place, and to destroy such as were found to be corrupt, etc.; that the defendants were such surveyors, so chosen, etc. The Court of Common Pleas sustained the custom. It was hard, they said, to disallow it, because the design of it was the preservation of men's health, even though to allow it were to give men too great a power of seizing and destroying other men's goods. So, the custom of a city to make a by-law to oblige a person to take an office, under a penalty.<sup>6</sup> So, too, the custom that where a duty was payable on corn imported into a city, citizens, being factors, were exempt from it; this in encouragement of trade.<sup>7</sup> Also, to dig gravel in the adjacent land to repair a way;<sup>8</sup> to have a watering-place in the adjacent land;<sup>9</sup> to dig for ballast;<sup>10</sup> to dry nets on another's land;<sup>11</sup>

<sup>1</sup> Browne on Usages & Customs, 19; Co. Lit. 62.

<sup>2</sup> Horton v. Beckman, 6 Term Rep. 760; Tyson v. Smith, 9 Ad. & E. 421.

<sup>3</sup> Post, Chap. V.

<sup>4</sup> Dane's Abr., chap. 26, art. 1, § 9; 3 Salk. 112; Fawcett v. Lowther, 2 Ves. 300.

<sup>5</sup> 1 Modern, 202.

<sup>6</sup> City of London v. Vanaere, 12 Modern, 269.

<sup>7</sup> Cocksedge v. Fanshaw, 1 Doug. 119.

<sup>8</sup> Dane's Abr., chap. 26, art. 2, § 1.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

## Illustrations.

to cut rushes in the lord's waste for one occupying a house and having common there, as against a stranger;<sup>1</sup> to distrain the goods, etc., of a ship for the port duties;<sup>2</sup> for the lord of the manor to have toll for all goods landed at a wharf, in consideration of his keeping it in repair;<sup>3</sup> to take three bushels of barley out of every ship's cargo brought to a certain quay to be exported;<sup>4</sup> for all the freemen and citizens of a town, on a particular day in the year, to enter upon a close for the purpose of horse-racing.<sup>5</sup> In *Marquis of Salisbury v. Gladstone*,<sup>6</sup> which was an action of ejectment for a forfeiture by a lord against a copyholder of inheritance, for digging and taking away clay from the manor, to be sold off the manor to any one, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without license from the lord, to break the surface and dig clay without limit, for the purpose of making it into bricks to be sold off the manor. The custom was held good in law. Its validity being disputed on the ground of unreasonableness, Lord CRANWORTH said: "It is true that a custom, to be valid, must be reasonable. It is not easy to define the word 'reasonable,' when applied to a custom regulating the relation between a lord and his copyholders. That relation must have had its origin in remote times, by agreement between the lord, as absolute owner of the whole manor in fee-simple, and those whom he was content to allow to occupy portions of it as his tenants-at-will. The rights of these tenants must have depended, in their origin, entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void as being unreasonable. *Cujus est dare ejus est disponere*. Whatever restrictions, therefore, or conditions the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant, or of the tenants to stipulate for. And if it were possible to show that before the time of legal memory any lawful arrangement had been actually come to between the lord and his tenants as to the terms on which the latter should hold their lands, and that arrangement had been constantly acted on, I do not see how it could ever be treated as being void because it was unreasonable. In truth, I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom."<sup>7</sup>

§ 34. Customs not unreasonable if simply inconvenient. — It was an old rule, in considering the validity of customs, that a custom should not be considered unreasonable merely because it might be inconvenient. Thus, a custom for all the inhabitants of a parish to play at games in a particular close was good, though if they were all to go there at the same time the object might become impossible. So, a custom for fishermen to dry their nets on land adja-

<sup>1</sup> *Beau v. Bloom*, 3 Wils. 458.

<sup>2</sup> *Wincklesine v. Ebdon*, 12 Modern, 216.

<sup>3</sup> *Colton v. Smith*, Cowp. 47.

<sup>4</sup> *Serjent v. Read*, 1 Wils. 91.

<sup>5</sup> *Mounsey v. Iamay*, 1 Hurl. & Coll. 729; 9

Jur. (N. S.) 306; 32 L. J. (Exch.) 94; 11 Week. Rep. 270; 3 Hurl. & Coll. 488.

<sup>6</sup> 9 H. L. Cas. 692.

<sup>7</sup> And see *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Dean of Ely v. Warren*, 2 Atk. 189.

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cent to the sea is good, though if all were to resort there at the same time, great inconvenience would follow. So, all the subjects of the kingdom have a right to enter a port, even though a small port might be speedily filled. It would be immaterial to the validity of this last custom that all people could not exercise this right at the same time. Many of the old English cases illustrate this rule. In *Hix v. Gardiner*,<sup>1</sup> a custom for all inhabitants within a manor to grind their corn at the mill of the lord of the manor was held to be good. In *Drake v. Wiglesworth*,<sup>2</sup> the custom was for all the householders of the parish to grind all the corn which should be used by them, in their respective houses, and to pay for the grinding thereof a reasonable toll, and it was held good. In *Cocksedge v. Fanshaw*,<sup>3</sup> a custom for the corporation of London to receive a toll of one farthing on all corn was sustained. In *Tyson v. Smith*,<sup>4</sup> an action of trespass, the custom set up was for all victuallers to erect booths on a common, a reasonable time before the feast of Pentecost. It was argued that the custom was too reasonable, because too extensive. But it was sustained by the King's Bench, and afterwards by the Court of Exchequer Chamber. "The plaintiff's arguments to show that this custom was bad in law," said DENMAN, C. J., in the King's Bench, "resolved themselves into the objection that it was too large and indefinite, as admitting all victuallers, an undefined body, who might cover the whole land in question, to the exclusion of the plaintiff himself, and all others wishing to attend the fair, during a considerable time of the year. But, in the absence of all authority, we are of opinion that the custom is good. The description of a victualler is sufficiently definite, and the attendance of that class of persons at a fair is convenient, or rather necessary, for the refreshment of those resorting to it. The exclusion of the owner from his own soil may certainly be lawful by virtue of reasonable custom, and the exclusion for the whole period may be necessary to induce the victualler to bring his booth to a spot possibly so distant that frequent removals and reerections might reduce his profits to nothing. And the apprehension that the resort of victuallers might be so numerous as to interfere with all others who may have business to transact at the fair, appears to us unreasonable and extravagant. If it could prevail, it must indeed extinguish the fair itself, to which all traders of every class may resort for the purpose of vending their wares, while due regard to their own interest must limit their actual attendance to such a number as appears likely to have a fair chance of trading successfully." "But it is said," remarked TINDAL, C. J., in the Exchequer Chamber, "that the number of these victuallers may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them, in exclusion of the rest. If this argument were to prevail, it is manifest that it would be equally applicable with respect to every particular branch of traders who frequent the fair; the sellers of corn or of cattle, the persons who deposit their cloth, the dealers in earthen-ware, and the like, might with equal show of reason be stated, by possibility, to become occupiers of the whole ground, to the exclusion of the rest. But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription for

<sup>1</sup> 1 Bulst. 195.<sup>2</sup> Willes, 651.<sup>3</sup> 1 Doug. 119.<sup>4</sup> 1 Nev. & P. 784; 1 Per. & Dav. 307.

## Illustrations.

the fair being a reasonable prescription; it is an objection only to the mode of exercising the rights so claimed, whether under the custom or the prescription. An inconvenience of this description will provide its own remedy; if it occurs once, it will not be likely to occur again. It is in the highest degree improbable that it should ever occur again at all. A little previous inquiry will at all times prevent its recurrence. And in *Bemington v. Taylor*,<sup>1</sup> where it was objected that a prescription was uncertain, and therefore void, which claimed toll for a stall, and the land '*propé et circà stallam*,' etc., the objection was not allowed; for this, it was said, 'shall be ascertained by the usage of the fair.' And these are precisely the points of consideration to which the judges must advert when called upon to determine whether the custom is void or not. It is not void as being against law; and if alleged to be void because inconvenient in a high degree in its enjoyment, and therefore unreasonable, they must look to the probabilities of the case, and be satisfied that the inconvenience is real, general, and extensive, before they hold a custom bad upon that ground, which a jury have found to exist and to have been acted upon from beyond the time of legal memory."

§ 35. **Customs injurious to the Public bad, though beneficial to some.** — On the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many and beneficial only to some particular person, is repugnant to the law of reason, and void; such a custom could not have had a reasonable commencement. Examples are present in the custom set up in a manor on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own; this is clearly bad, being injurious to the multitude and beneficial only to the lord. So, a custom that the lord of the manor shall have a certain sum for every pound breach of any stranger, or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will. So, a custom in restraint of trade.<sup>2</sup> So are customs for parishioners, on the perambulation of the boundaries, to go through a particular house situated in the parish, but not upon the boundary line;<sup>3</sup> for the inhabitants of a parish to exercise and train horses, at all seasonable times of the year, beyond the limits of the parish.<sup>4</sup> In all these instances, and many others which are to be found in the books, the customs are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate.<sup>5</sup>

§ 36. **The Existence of unreasonable Modern Usages doubted.** — Chief Justice THOMPSON, of Pennsylvania, in *McMasters v. Pennsylvania Railroad Company*,<sup>6</sup> thought that in modern times it would not be likely that anything which was not reasonable would be suffered to grow into a custom; and CHEEVES, J., in an earlier South Carolina case,<sup>7</sup> expressed a similar opinion. "It is argued,"

<sup>1</sup> 2 Lutw. R. C. 1517.

<sup>2</sup> *Mayor of Winton v. Wilks*, 11 Modern, 48.

<sup>3</sup> *Taylor v. Devey*, 7 Ad. & E. 469; 2 Nev. & P. 469; 1 Jur. 892; W. W. & D. 616.

<sup>4</sup> *Sowerby v. Coleman*, L. R. 2 Exch. 96;

<sup>5</sup> L. J. (Exch.) 57.

<sup>6</sup> *Smith v. Tyson*, 1 Per. & Dav. 307.

<sup>7</sup> 69 Pa. St. 374.

<sup>8</sup> *Barksdale v. Brown*, 1 Nott & M. 517; 9 Am. Dec. 720.

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Reasonableness.

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said he, "that this usage is unreasonable, and therefore not a good usage. I know we frequently say that a usage, to be binding, must be reasonable; but I very much doubt whether this is not a mistaken view of the subject, and drawn from a supposed, but not real analogy between commercial usages and common-law customs. I doubt whether there can be a commercial usage which can be deemed so palpably unreasonable as not to be binding. A usage so unreasonable can never grow up. The free course of trade will not permit it; as well might a plant vegetate under a great incumbent weight. That it is a usage is itself a proof of its reasonableness, so irrefragable that no abstract reasoning can explain it away. The real inquiry ought to be: Is it a usage? Has it been sufficiently established? To establish a usage, it ought to be proved to be so general, uniform, and frequent as to warrant an inference that the party against whom the benefit of it is claimed had a knowledge of it, and contracted with reference to it." Nevertheless, as a matter of fact, numerous usages have been set up in very recent times that the courts have been obliged to declare unreasonable.

§ 37. *Usages prima facie reasonable* — The Test of their Reasonableness. — But proof that a custom is general and established raises a presumption that it is reasonable. As said in *Cox v. Charleston, etc., Insurance Company*,<sup>1</sup> "Proof of a general custom furnishes a strong reason why we should regard it as reasonable. It must be sanctioned by general concurrence in its use for several years, before it can be said legally to exist. If it was unreasonable, and of course without necessity, reasonable and prudent men would not continue to peril both life and property to give it existence. From proof of it as the general custom of the trade, we are bound, at least *prima facie*, to conclude that it is reasonable." And it is to be remembered that usages apparently unreasonable may have been so long continued as to have acquired the force of law, and the unreasonableness now apparent may have grown out of changes occurring after the usage was established. In such a case a court must take it as it finds it, and give its judgment in accordance thereto. But when a question is first presented as to giving legal effect to a usage proved to exist, where its binding force or its admissibility is denied by one of the parties to the cause, a court will not enforce or sanction it unless it be reasonable and convenient, and adapted not only to increase facilities in trade, but to the promotion of just dealings between parties.<sup>2</sup> Subject to these exceptions, it is settled that if a usage leads to consequences which are absurd, or which could not be fairly presumed to have been contemplated by the parties, the presumption is repelled which the law might otherwise make, that it was intended to be adopted as part of the contract. Therefore, courts of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties, in framing their contracts, have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them.<sup>3</sup> But there is little doubt that a usage known to a person, and in accordance to whose burdens and obligations he has contracted, would not be set aside by a court of law simply because it was unreasonable.

<sup>1</sup> 3 Rich. L. 331.

<sup>2</sup> *Seccomb v. Provincial Ins. Co.*, 10 Allen,

<sup>3</sup> *Hubbard, J.*, in *Macy v. Whaling Ins. Co.*, 305.

<sup>4</sup> *Metc.* 354.

## Vendor and Purchaser.

A man may, with his eyes open, make an absurd, oppressive, or unreasonable contract, and bind himself to the performance of strict and onerous obligations, yet a court of law will not for this reason interfere.<sup>1</sup>

Tested by these considerations, the following usages of modern growth have been declared unreasonable—and for that reason invalid—in the following relations:—

§ 38. Unreasonable Usages—Between Vendor and Purchaser.—In the relation of vendor and purchaser these are unreasonable: A custom authorizing, on a contract for goods of a specified character, the delivery of different goods, or on a sale of the goods of one mill, the delivery of the goods of another mill;<sup>2</sup> a usage that sales of a particular class of goods are subject to the approval of a public inspector, but that if there is no such inspector, a buyer may rescind his purchase at pleasure;<sup>3</sup> a usage that no title passes, upon an ordinary sale and delivery, without actual payment of the consideration within a certain number of days;<sup>4</sup> a custom that if a note is given for a gold-mine, and it proves unproductive, or does not turn out according to expectation, it is given up;<sup>5</sup> a custom for merchants to sign receipts presented by cartmen with goods, without any inquiry on the part of the receiving-clerk or porter as to their ownership or the place from which they were received;<sup>6</sup> a custom of a board of trade, on cash sales of produce or provisions, giving the buyer the privilege of having them inspected at his own expense, but if he accepts them without inspection, he takes them at his own risk as to quality, even if the vendor occupies a position where he may be supposed to know the quality of the goods, and the vendee relies upon this supposition;<sup>7</sup> a custom among dealers in cotton that warehouse-receipts to deliver to a person, or order, or bearer, the number of bales therein specified, are transferable by delivery without indorsement, and that such transfer passes the cotton without inquiry as to title, unless notice is given that the receipts have been lost, or have got into the hands of one not the owner or not entitled to them;<sup>8</sup> a usage that where the vendor of goods receives a note of the consignee, without the indorsement of the purchaser, the latter is discharged, and the maker alone remains liable;<sup>9</sup> a custom among merchants

<sup>1</sup> See remarks of Cleasby, B., in *Maxted v. Paine*, L. R. 4 Exch. 210.

<sup>2</sup> *Beals v. Terry*, 2 Sandf. 127.

<sup>3</sup> *Boardman v. Spooner*, 13 Allen, 353.

<sup>4</sup> *Haskins v. Warren*, 115 Mass. 514.

<sup>5</sup> "If there be such a custom, it is so unreasonable that it was probably enforced by the bowie-knife." *Leonard v. Peeples*, 30 Ga. 61.

<sup>6</sup> "Entirely unreasonable, because it placed the consequences of one person's negligence and inattention upon another, in no way connected with him, having no control over his conduct, and for whose acts he could be in no proper sense responsible. A custom tolerating carelessness and inattention in the ordinary affairs of business would be inconsistent with the legal as well as the social duties which one person, in

those affairs, owes to another." *Daniels, J., in Gallup v. Lederer*, 1 Hun, 282.

<sup>7</sup> *Chicago Packing Co. v. Tilton*, 87 Ill. 548.

<sup>8</sup> "None but good customs have any validity. A custom that has a tendency to tempt parties to acts of wrong-doing, bad faith, or dishonesty, cannot be a good custom. A bad custom ought to be abolished. *Malus usus est abolendus*." *Peck, C. J., in Lehman v. Marshall*, 47 Ala. 302.

<sup>9</sup> "It is not denied but that the dealing was with the defendant. He bought and received the goods. The plaintiff sent for his money. The debtor had gone to sea. The note of another was taken by the plaintiff's agent. Now, would it be reasonable that the plaintiff should, from this isolated circumstance, unaccompanied with any satisfactory proof why or wherefore it was done,

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## Unreasonable Usages.

to have their goods sent to their stores by long and circuitous routes, when purchased at the stores of near neighbors;<sup>1</sup> a custom of a shopkeeper to balance his books annually, and charge interest on the balance of a running account where there has been no settlement.<sup>2</sup>

§ 39. **Same — Banks and Banking.** — A custom of banks to honor the occasional overdrafts of customers whose standing is good, is unreasonable,<sup>3</sup> and so is a custom in banks not to rectify mistakes unless discovered before the person leaves the room;<sup>4</sup> but this is not so of a custom which requires every depositor to produce his pass-book when demanding payment of a deposit.<sup>5</sup>

be debarred the right of recovering the debt from the true and *bona fide* debtor? A custom so unreasonable can never supersede law." Ganitt, J., in *Prescott v. Hubbell*, 1 McCord, 94.

"In this case the main question is, whether the acts of Shorey were within the scope of a general design to share the profits of the enterprise with Mathes, or whether the goods were obtained on his own credit, or for his own private use and purposes. \* \* \* The plaintiffs, having introduced evidence tending to show that some of the goods in Shorey's store passed into the hands of Mathes, and that in being removed from one store to another they were conveyed by and through a long and circuitous route, the defendants were not permitted by the court to show the existence of a usage or custom among the merchants of Portsmouth and Manchester, or elsewhere, to have their goods sent to their stores by long and circuitous routes when purchased at the stores of near neighbors. We think the court properly rejected this kind of testimony. The general presumption of law on this subject would naturally be that merchants, in the transportation of their goods, will be governed by their true and essential pecuniary interests. That route will be preferred, other things being equal, which is the shortest and cheapest, requiring the least expenditure of money. In general, a custom of merchants must be reasonable in itself. \* \* \* The law will not permit us to presume that the honest merchants and business men of any city in our State would prefer to transport their goods by a long and circuitous route when they had an opportunity to use one more direct, of equal fitness for travel, and requiring a less outlay for freight. We think it would be suspicious, absurd, and unreasonable to assume the existence of such a usage, and it would be in violation of the common experience of mankind, as well as the familiar maxim of

law, *Ad vana et impossibilia lex non cogit.*" Nesmith, J., in *Jacobs v. Shorey*, 48 N. H. 100.

"Sanction this, and it is made the direct interest of this class of people to encourage their dilatory customers to run up their accounts with them, knowing that until the time comes for pressing a settlement, their accounts will be drawing interest. When the day of settlement comes, the debtor finds himself, unacquainted as he generally is with the operation of this principle, in debt to perhaps double the amount he supposed; a judgment and mortgage is the consequence, and finally it ends in his property being sold for half its value. To protect the ignorant and unwary, public policy requires that courts of justice should put the seal of reprobation on such implied, unjust, and oppressive agreements. When there is a settlement between them, and a promise to pay interest, the intention of the debtor is called to the state of the account. If he is wronged, it is his own fault; he then goes on with his eyes open. Interest, in Pennsylvania, has already been extended further than in England, or in most of the States of the Union, and it is time for us to pause and consider whether it has not been sufficiently extended." Rogers, J., in *Graham v. Williams*, 16 Serg. & R. 257; 16 Am. Dec. 569.

<sup>3</sup> *Lancaster Bank v. Woodward*, 18 Pa. St. 357.

<sup>4</sup> "If such a custom does exist, it is contrary to law, and ought not to meet with the sanction of a court of justice. The law declares that money received through mistake shall be refunded; and this rule of law is founded in morality, which makes part of the law of the land. \* \* \* Such a custom in banking institutions may be an evidence of avarice, but not of the practice of justice among those concerned." *Gallatin v. Bradford*, 1 Bibb, 269.

<sup>5</sup> *Warhus v. Bowery Savings Bank*, 5 Duer, 67.

## Carrier and Customer.

§ 40. **Same — Carrier and Customer.** — As affecting the relations of carrier and customer, these usages have been declared unreasonable and void: A usage for wharfingers to act as agents in accepting, on behalf of consignees, goods arriving at the wharves;<sup>1</sup> a usage for the consignee of a vessel, who is also the owner of the cargo, to charge a commission on the freight paid by himself to the captain;<sup>2</sup> a custom that an intermediate carrier, who received property subject to charges, may deduct from the freight earned by the prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading;<sup>3</sup> a usage of a port, that in order to constitute a delivery of goods by a carrier by water, a receipt must be given to the carrier by the consignee or his agent;<sup>4</sup> a custom that freight paid in advance may not be recovered back, even though not earned;<sup>5</sup> a custom that a notice published in three newspapers in a city, of the time and place of landing goods by steamboat, is such a notice as places them at the risk of the consignee;<sup>6</sup> a custom among the owners of tow-boats that the first coming alongside of a ship, on a signal for steam, has an absolute towing-contract;<sup>7</sup> a usage requiring those who are in the legal use of the waters as a highway, to yield to others who are using them for an unlawful purpose;<sup>8</sup> a custom among carriers and shippers that a contract made between them to furnish and carry coal to a certain port for sale may be thrown up by either, at his convenience, no damage to be claimed from either;<sup>9</sup> a usage of a railroad company requiring claims for

<sup>1</sup> The *Middlesex*, 11 Law Rep. (N. S.) 114.

<sup>2</sup> *Jelison v. Lee*, 3 Woodb. & M. 368.

<sup>3</sup> "All customs must be reasonable. If the one in question were confined to vesting in the intermediate consignee the same power to refuse to pay freight in cases in which the owner would be justified in doing so, it would not exceed the reasonable province of a mercantile usage. But it goes very much further when it makes the bill of lading conclusive in favor of the intermediate carrier, and allows him to make deductions for supposed deficiencies not in fact existing, which the owner himself would not be permitted to make. And it is specially unreasonable if it deprives the carrier of his lien, and remits him to a personal responsibility which he never relied on, whether he is given a remedy in all cases against the consignor, or required to follow the money to the hands of the owner, who will usually reside at a point distant from the place where the exaction is made, and frequently in a foreign country." *Cooley, C. J.*, in *Strong v. Grand Trunk R. Co.*, 15 Mich. 206.

<sup>4</sup> "It is unreasonable, because it imposes on a carrier the burden of procuring an act to be done by another person, the performance of which he has no power to compel or enforce, or which, from design or

accident on the part of others, it may be difficult or impossible for him to cause to be accomplished. It is no answer to the objection to say that if through no fault of his own the carrier cannot comply with the usage, he may then prove delivery of the property in some other manner. This does not relieve the difficulty, because in the contingency supposed he would be obliged to show the existence of facts sufficient to excuse a non-compliance with the usage before he could be allowed to prove by the ordinary legal evidence that he had fulfilled his contract. No usage to which such a consequence attaches can be deemed to be consistent with the principle that no unusual or disproportionate duty or burden can be thrown on one of the parties to a contract by local usage or custom." *Reed v. Richardson*, 98 Mass. 214.

<sup>5</sup> *Emery v. Dunbar*, 1 Daly, 408.

<sup>6</sup> *Kohn v. Packard*, 3 La. 224; 23 Am. Dec. 453.

<sup>7</sup> *Clark v. Gifford*, 7 La. 524.

<sup>8</sup> *Harding v. The Maverick*, 5 Law Rep. 106; *The Maverick*, 1 Sprague, 23.

<sup>9</sup> "It nullifies the contract and subverts the very objects for which it was entered into — the carrying of the plaintiffs' goods and the beneficial employment of the defendant's vessel. A contract which is ab-



## Unreasonable Usages.

losses to be made at the time the goods are delivered,<sup>1</sup> or within ten days thereafter;<sup>2</sup> a custom of a railroad company that before a consignee can obtain his wheat from the company's bins, he must receipt for the quantity;<sup>3</sup> a custom of a railroad company not to be responsible for the conduct of its agents in regard to the contents of chartered cars, of which they hold the keys;<sup>4</sup> a usage of a steamboat company not to allow a passenger to take to his state-room such baggage as he may require for his personal use.<sup>5</sup> And "no custom, if it were possible for such a custom to grow up, could be upheld as reasonable which would justify a steamboat carrier who had goods consigned to a person at a particular landing on the river, — where there was a warehouse and a warehouse-keeper, who usually received and took care of goods landed there for the consignee, — in putting out such goods on the river bank, without any protection, when the landing had in the meantime been broken up by an inundation, and the washing away of the buildings and the removal of the persons that constituted it a landing."<sup>6</sup> In *Dixon v. Dunham*,<sup>7</sup> the Supreme Court of Illinois gave illustrations of usages of this character, reasonable and unreasonable, respectively: "A custom," it is said, "must be reasonable in view of the circumstances. For instance, a vessel having a single package for a consignee in the port of Chicago, it might be very unreasonable to require the vessel to remove from her usual dock where she is accustomed to land and discharge her freight, and a custom absolving her from such duty might very readily acquire a validity among all parties; whereas, were she loaded with an entire cargo for a consignee, — as timber, or pig or railroad iron, — it might be very unreasonable for the captain to claim the right to deliver the cargo at a distance from the wharf of the consignee, where he would not only be compelled to have it reshipped or transported by land, but also to pay wharfage; and a custom which would secure that privilege to a carrier would be likely to meet with opposition, if not with continued resistance. \* \* \* Customs are instituted and admitted to promote the interests and convenience of trade, under the supposition that the slight inconvenience which one class suffers by reason of them is more than counter-

solate in terms it makes conditional; an obligation expressly enjoined upon both parties it makes optional with either. Under its application the defendant cannot reckon with any confidence upon employment for his vessel, or the plaintiffs upon the receipt of their goods, though they have mutually entered into a valid contract to secure both these objects. Instead of subserving the purposes of the parties, as disclosed in their contract, it dominates over and controls them; in fine, it makes the contract subordinate to the usage, and the legal rights of either party to hinge upon the convenience or caprice of the other. It is difficult to understand how such a practice could ever have assumed the proportions necessary to give it the cognomen of a commercial usage in a commercial community. It is less difficult, however, to understand that it could never have the sanction of

law." *Dickerson, J.*, in *Randall v. Smith*, 63 Me. 105.

<sup>1</sup> *Memphis R. Co. v. Holloway*, 4 Law & Eq. Rep. 425.

<sup>2</sup> *Browning v. Long Island R. Co.*, 2 Daly, 117.

<sup>3</sup> *Christian v. St. Paul, etc., R. Co.*, 20 Minn. 21.

<sup>4</sup> "The custom, if it exists, is a most unreasonable one. To hold a key, and yet not be accountable for what is taken out of a car, would be contrary to all sense of right." *Jackson, J.*, in *Central R. Co. v. Anderson*, 58 Ga. 393. But a custom to give preference to the delivery of perishable property over other freight is reasonable. *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594.

<sup>5</sup> *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 229.

<sup>6</sup> *Stone v. Rice*, 58 Ala. 95.

<sup>7</sup> 14 Ill. 324.

## Insurance—Master and Servant.

balanced by the benefits to another class, and that the inducements thus offered compensate the lesser loss by the reduced charges which are thereby induced."

§ 41. **Same—Insurance.**—In the law of insurance, these have been held unreasonable, viz.: A usage of marine companies to require a survey of the goods damaged by the port-wardens, as a preliminary proof of the loss;<sup>1</sup> and a usage of the same class of insurers to pay only two-thirds of the gross freight on a total loss.<sup>2</sup>

§ 42. **Same—Master and Servant—Employer and Employee.**—The following customs have also been held unreasonable: A custom that if a female slave, hired by the month or week, should be confined and delivered of a child during the term, the owner should pay a certain sum to the hirer;<sup>3</sup> a custom among wholesale dealers allowing their salesmen pay for time lost by sickness, without regard to the length;<sup>4</sup> a custom for sawyers to ship the lumber intrusted to them, and converted into logs, to lumber factors, to be sold by them;<sup>5</sup> a custom that a person employed to cut staves from another's bolts has a right to take to his own use the clippings, corner-pieces, and culls, without the consent of the owner;<sup>6</sup> a usage of plasterers to charge not only for the space covered, but for one-half of the surface occupied by openings.<sup>7</sup>

<sup>1</sup> Rankin v. American Ins. Co., 1 Hall, 619.

<sup>2</sup> McGregor v. Insurance Co., 1 Wash. C. Ct. 39.

<sup>3</sup> Cooper v. Purvis, 1 Jones L. 141.

<sup>4</sup> Sweet v. Leach, 6 Bradw. 212.

<sup>5</sup> "The custom thus set up is clearly bad, and forms no justification for the acts alleged to have been done under its authority. A custom that those who have a lien for work may sell the property on which it rests, after a demand of the debt and a reasonable notice of the time and place of sale, might perhaps be good, although I certainly do not undertake to say that it would be so; but a custom under which no man in Lyecoming could send his logs to a saw-mill without the risk of having them sent for sale to a distance, without consulting his wishes or giving him an opportunity to pay what he owed and resume possession of the property, is too clearly vicious to justify the consumption of time in pointing out the many particulars in which it sins against reason as well as common right and justice." Hare, J., in Bean v. Bolton, 3 Phila. 87.

"As a custom, it cannot be upheld. Customs must be reasonable, and not contrary to the general principles of law. A custom which is unreasonable and in opposition to the general principles of law is void. \* \* \* The property in the culls and corner-pieces was vested in the defendant. They were of value, as appears by the plaintiffs' own showing, and were an article of

merchandise. The defendant might have parted with them by contract. Perhaps a license to take them might be inferred from their having been suffered to remain unclaimed for a sufficient length of time in the plaintiffs' mill-yard. But a custom for the cutter to take and appropriate them to his own use, without the agreement or consent of the owner, cannot be sustained. Such a custom is not only not in harmony with law, but manifestly against public policy. To allow a mechanic or artisan who works up the materials of another to keep so much of such material as is not used for the benefit of the owner of the material is to array his interests in direct opposition to those of his employer. This is strongly illustrated in the case of the culls. It appears that in this instance the plaintiffs and their employees culled the defendant's bolts, and such we understand from the evidence to be the general practice. If the culler is to be entitled to all the bolts which are determined by him to be unfit for staves, he is under a very direct temptation to cull in a careless, not to say fraudulent manner, so as to increase his own profit at the sacrifice of the interest of his employer. Such a custom, as a custom binding upon the owner of the property, is unreasonably contrary to public policy, and cannot have the sanction of law." Talcott, J., in Wadley v. Davis, 63 Barb. 500.

<sup>7</sup> "The pretended usage of the plasterers

## Unreasonable Usages.

§ 43. **Same — Public Officers.** — Likewise, these customs are adjudged unreasonable, viz.: A custom for a flour inspector, who, by statute, is to receive a specified compensation in money, to take to his own use the flour drawn from the barrel in the process of inspection, called the "draught flour," as an additional compensation or perquisite;<sup>1</sup> a usage of government officers to accept bills without consideration, or to pledge the credit of the nation as surety for, or the accommodation of a contractor;<sup>2</sup> a custom for holders of settlements and pre-emptions of land to give one-half to another for surveying, obtaining pre-emption-warrants, and paying all expenses for carrying the claims to a grant;<sup>3</sup> a custom, in making surveys for locations of government land granted to a settler, to include more land than the warrant actually called for.<sup>4</sup>

in the present instance is unreasonable and bad in itself. To charge an employer with materials never received, is the height of injustice." *Jordan v. Meredith*, 3 Yeates, 318. But see *Walls v. Bailey*, 49 N. Y. 464.

<sup>1</sup> "Such a custom, when invoked for the benefit of a public functionary by transferring to him a portion of the goods of the citizen, with which he is called upon to deal in the discharge of his office, by way of additional compensation or perquisite, over and above what the law expressly provides, would be bad, as being unreasonable, unjust, and contrary to the policy of our laws. It would be unjust and unreasonable that a public officer, having a specified duty to perform in relation to the property of others for a prescribed fee, should by the discharge of that duty acquire a right not only to the fee allowed, but also to a part of the property itself. It thus makes him the sole judge of the compensation which he shall receive. There is not even the pretence of a contract, which might be said to be made with reference to the custom. The manufacturer who designs his flour for shipment has no choice in regard to the inspection. He is required by law to have such flour inspected, and is subject to a heavy penalty if he shall export or ship it without such inspection. He pays the fee because required by law to do so, but in no sense does he stand in the relation of a contracting party to the inspector. \* \* \* It is but a *petitio principii* to say that the inspector may appropriate the draught flour to his own use because he may destroy it or throw it away. If it be conceded that to inspect means more than to make mere ocular examinations, and that the inspector is authorized to bake a portion of the flour into bread, or subject it to a chemical test, still that would not authorize him to take away any more than is necessary for that purpose, nor even that for his own use and benefit. Tak-

ing away the draught flour is no part of the inspection, for that may be made whether the inspector appropriates it to himself or restores it to the owner. The practice of millers to take toll for grinding gives no countenance to this custom. The cases are in no respect parallel. The shipper of flour has no option; he must have his flour inspected and pay the fee, without anything in the nature of a contract between himself and the inspector. The owner of grain may or may not have it ground, at his pleasure; and if he does, it is a matter of contract between himself and the miller that the toll is yielded. They may agree that the compensation for grinding shall be in money, or other thing instead. Nor is there any real force in the suggestion, however plausible it may seem, that the inspector may keep the draught flour for the purpose of vindicating his judgment if he should be sued for a false brand. It is impossible to believe that such a motive could have been the origin of this custom. No case, I apprehend, has ever occurred in which such an instrument of evidence has been resorted to, nor is it at all likely that ever the flour drawn by an inspector was retained for any such purpose. In point of fact, the practice has been universal for the inspectors to mix the flour thus drawn in a common bulk, and to sell or otherwise dispose of it. And, moreover, the gist of any action against an inspector for a false brand would be the honesty, and not the absolute correctness of the judgment which he had pronounced." *Lee, J., in Delaplane v. Crenshaw*, 15 Gratt. 456.

<sup>2</sup> *Pierce v. United States*, 1 Cl. of Cl. 290.

<sup>3</sup> *Carr v. Callaghan*, 3 Litt. 372; *Watkins v. Eastin*, 1 A. K. Marsh. 402; *Bodley v. Craig*, 1 B. Mon. 77.

<sup>4</sup> "Is this pretended custom reasonable? If it be reasonable that a man to whom the government makes a donation of one thousand acres of land, and suffers him to locate

## Principal and Agent.

§ 44. Same — Principal and Agent. — Many usages affecting the relation of principal and agent have been declared void for unreasonableness — as, for example, a custom that a man, without any authority from the owner of lands, and without his consent or knowledge, and without knowing whether he wishes to sell or not, may dispose of them on the ordinary terms, and by so doing bind the owner;<sup>1</sup> a usage among owners of vessels to accept all bills of their masters for supplies furnished abroad;<sup>2</sup> a custom that the master of a vessel, as such, may purchase a cargo on account of the owners, without their authority,<sup>3</sup> or may have the right to sell the vessels without authority from the owners;<sup>4</sup> a usage for a broker, employed to purchase stock, to buy the stock for himself, without his principal's knowledge;<sup>5</sup> a custom that an agent may sell the property of his principal before he is instructed to do so, and on demand of the property back, may tender him similar articles in their stead;<sup>6</sup> a usage of agents, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and to take in exchange their checks upon banks;<sup>7</sup> a usage of brokers of tanned skins to insert in the memorandum of sale, unless forbidden by the vendor, and the

it himself, should, instead of the one thousand acres, appropriate to himself twelve or fifteen hundred acres, then this pretended custom is reasonable. But if by such conduct he commits a fraud upon the government and upon other individuals in the same situation as himself, it is unreasonable, and ought not to be sanctioned." *Hitchcock, J., in Huston v. McArthur, 7 Ohio, 70.*

*Carr v. Callaghan, 3 Litt. 372.*

2 "That usage cannot be reasonable which puts at hazard the property of the owners at the pleasure of the master, by making them responsible, as acceptors, on bills drawn by him, and which have been negotiated on the assumption that the sums were needed for supplies or repairs; and no evil can flow from rejecting such a usage, because owners who have confidence in the judgment and discretion, as well as the integrity of their ship-masters, can give them, at their pleasure, a limited authority to draw, which will furnish them with credit, and protect them from imposition." *Hubbard, J., in Bowen v. Stoddard, 10 Mete. 375.*

3 "If the owners have permitted the master to purchase on their account, or have ratified such acts when they became known to them, they would by such a course of dealing hold him out as their agent, authorize him to purchase, and they would be bound by his acts. But the shopkeepers in a village might as well undertake to set up a usage to trust every man's servant to contract debts for his master without authority, as the dealers in lime, or any other article, in a particular place, a usage to sell to masters of vessels without authority from the own-

ers, and thereby bind them." *Shepley, J., in Hewett v. Buck, 17 Me. 147.*

4 "That masters should have right, merely as masters, to sell the property of their owners in the vessels they command, without authority from their owners, would be most unjust and impolitic; and any practices of that kind ought to be repudiated as iniquitous and absurd, rather than to be improved as precedents to establish a rule." *Henshaw v. Clark, 2 Root, 101.*

5 *Pickering v. Demeritt, 100 Mass. 421.*

6 "The custom alleged, if it existed, would be contrary to law and good morals, and could not be recognized by a court of justice. Under it the principal, in case of his agent's failure, could no longer identify his property, and his right to take it back in kind would in every case be defeated. After the sale by the factor of the property of his principal, in violation of orders, his interest becomes adverse to that of his employer. Having to return the property in kind, he has an interest in the fall of the market, and is subjected to the temptation of assisting to bring it about, in direct opposition of his duty to the principal who employs him." *Root, J., in Foley v. Bell, 8 La. An. 700.*

7 "It is undoubtedly true that men who keep bank accounts are accustomed to give checks for their debts, and in most cases their standing is such that these checks are taken by their neighbors as readily as cash. This may make a common practice among men who are dealing on their own account in respect to such dealings; but such a practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one

## Unreasonable Usages.

buyer has an opportunity for examination, a warranty of merchantable quality a custom of public warehouse-keepers in London to have a general lien upon all goods from time to time stored in their warehouses for and in the name of the merchants or other persons by whom such public warehousemen are retained or employed, for all moneys, or any balance thereof, due from such merchants or other persons to such warehousemen for or on account of advances or expenses which such warehousemen should have made, or been put to, in or about the payment of duties or of customs on goods consigned to them from abroad, or the payment of freight or other charges for the conveyance of such goods to the port of London, or the entering, landing, and warehousing such goods;<sup>2</sup> a custom that a person employed by a company to devote his time to its business, for its exclusive profit, should be allowed to engage in a similar business on his own account;<sup>3</sup> a custom for ship-brokers to receive a commission from the seller of a vessel when they introduce the purchaser to him, and are not otherwise employed in the transaction;<sup>4</sup> a custom for an agent to receive compensation from both buyer and seller;<sup>5</sup> a custom under which an insurance agent receives from the company commissions on the renewal premiums on all policies obtained

who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." Chapman, C. J., in *Whitney v. Esson*, 99 Mass. 308.

<sup>1</sup> "By the terms of the usage, the authority of the broker to give a warranty is implied, wholly irrespective of the nature and condition of the particular property which may be the subject of the contract, without any regard to the facts and circumstances under which the sale is authorized to be made. If this usage is upheld, then a broker may give a warranty binding on his principal, although the latter may have authorized goods to be sold, not for a sound price, but at a rate far below the market value of a merchantable article; so, he may be held liable on his broker's warranty although at the time of the sale he may never have seen the goods, and knew nothing of their condition or value, or even when he knew that they were of an inferior article, or had been greatly damaged; and this, too, where the vendee may have seen and examined the article, and had full opportunity to become acquainted with its quality and condition. The dangerous consequences which would follow if such usages were permitted to interfere with the operation of established legal principles, and to control the rights and obligations of parties under contracts, are too plain and palpable to allow us to hesitate in rejecting them as unreasonable

and invalid." Bigelow, C. J., in *Dodd v. Farlow*, 11 Allen, 426.

<sup>2</sup> "The general lien claimed is not confined to goods the property of the person who employed or retained the warehouse-keeper, but extends to all goods which are put by him, in his own name, into the hands of a warehouse-keeper, whether his property or not. The custom set up in the plea, if supportable, would make the goods of a foreign merchant which have been consigned by him to a London factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent. It appears to us that such a custom is at once unreasonable and unjust, and therefore bad in law. It is a custom which is obviously prejudicial in a direct manner and in a very high degree to foreign trade; for no foreign merchant would be content to consign his goods to this country for sale if they could be made liable, whilst warehoused for the purpose of custody, to satisfy a debt already due from the factor in respect of other goods." Tindal, C. J., in *Leuckart v. Cooper*, 3 Scott, 521 (overruling *dictum* in *Leuckart v. Cooper*, 7 Car. & P. 119).

<sup>3</sup> *Stoney v. Farmers' Transp. Co.*, 17 Hun, 583.

<sup>4</sup> *Winsor v. Dillaway*, 4 Metc. 221.

<sup>5</sup> See notes to *Raisin v. Clark*, *post*, Chap. V.

## Illustrations.

by him for three years after the termination of his engagement;<sup>1</sup> a custom entitling a wharfinger to deliver goods, with credit for the freight, without incurring any responsibility, and entitling him to be regarded as still continuing the forwarder's agent to receive the amount.<sup>2</sup>

§ 45. *Same — Miscellaneous.* — Various other usages have been adjudged invalid by the courts on account of their unreasonableness, as follows: A custom to use and imitate the trade-marks of foreigners with impunity;<sup>3</sup> a custom of publishers of newspapers to insert advertisements sent to them without express directions as to the number of insertions, until their publication is expressly countermanded, even after the object of the advertisement has ceased, and that fact is apparent on its face;<sup>4</sup> a custom to mine coal without leaving pillars or posts to support the surface;<sup>5</sup> a custom on the Connecticut River that when any person clears a place for seine-fishing, he holds it against the world during the fishing-season;<sup>6</sup> a custom of the owners of mines to dispose of water pumped therefrom, by allowing it to flow into the adjacent natural water-courses, even though it polluted the streams of adjoining proprietors;<sup>7</sup> a custom that the outgoing tenant of a farm shall look exclusively to the incoming tenant, when there is one, and not to the landlord, for compensation for seeds, acts of husbandry, tillage, etc.<sup>8</sup>

<sup>1</sup> "The custom does not appear to be reasonable. We would scarcely suppose that such power over the funds of the company would be left, for a period of three years after the termination of the agency, in the hands of one who, at the time, would not be under bond." *Hines, J., in Castleman v. Southern Mutual Ins. Co.*, 14 Bush, 197.

<sup>2</sup> "I question whether any such custom could be recognized in law." *Macaulay, C. J., in Torrance v. Hayes*, 2 Upper Canada C. P. 338.

<sup>3</sup> *Taylor v. Carpenter*, 2 Woodb. & M. 1.

<sup>4</sup> *Thomas v. Graves*, 1 Mill Const. 208.

<sup>5</sup> *Coleman v. Chadwick*, 80 Pa. St. 81. And see *Jones v. Wagner*, 66 Pa. St. 430; *Horne v. Watson*, 79 Pa. St. 242.

<sup>6</sup> *Freary v. Cooke*, 14 Mass. 488. And see *Lutkin v. Haskell*, 3 Pick. 356.

<sup>7</sup> A coal company had pumped from its mines a quantity of water which polluted a previously pure stream of the plaintiff, into which it found its way. In an action therefor it was contended by the defendant that the customary mode of disposing of water pumped from the mines in that region had always been to allow it to flow into the adjacent natural watercourses; and proof of such a custom was offered. *Said Gordon, J.*: "More fatal still to the defendant's pretensions is the fact that the effort is thus to justify the disturbance of private property for the advancement of the private interests of the defendant corporation; and that not

under the plea of an ancient customary use, arising before the plaintiff acquired title, but of a general custom which would authorize the present injury or destruction of the rights of riparian owners. But a custom such as this would not only be unreasonable, but also unlawful, and therefore worthless. It is urged that mining cannot be carried on without this outflow of accluous water, hence of necessity the neighboring streams must be polluted. This is true; and it is also true that coal-mining would come to nothing without roads upon which to transport the coal after it is mined; therefore roads are necessary; but it does not follow that for such purpose the land of an adjacent owner may be taken, or his right of way encumbered, without compensation." *Pennsylvania Coal Co. v. Sanderson* (Sup. Ct. Pa., May, 1880).

<sup>8</sup> "The custom here found to exist, in point of fact, is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant; the custom as found exempts the landlord from liability altogether. Such a custom will be found, on examination, to involve the following consequences: 1. That the outgoing tenant has imposed upon him, for his sole and exclusive debtor, a person in whose selection he has no choice, and with whom he has made no contract at all. 2. That the incoming tenant has to make compensation to the outgoing tenant irre-



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§ 46. **The Custom of a particular Person or the Habit of an Individual.**—We come now to the third and last of the particular customs which are the subject of this treatise, viz.: the custom of a particular person or the habit of an individual. If the memory of a witness is defective concerning an act which it is of importance to prove as having occurred at a particular time, or under certain circumstances, it would seem that his custom to do that act at the time or under the circumstances alleged should be of weight in raising an inference that the act was then performed, and evidence of the habit ought therefore to be allowed. In the progress of a trial, for example, it is desired to prove that A., at eleven o'clock on the night of January 1, 1880, was in bed. A. cannot swear positively that he was in bed at that hour on that particular night; but A. is a man of correct and methodical habits, and he is willing to swear that it has been his universal custom, to which he cannot recollect an exception, to retire at ten P. M. It is obvious that this would tend to satisfy the ordinary mind that A. was in bed at the hour named. Therefore, it is apprehended that such testimony would not be rejected by the courts; it has been spoken of in one case as "persuasive and legitimate supporting evidence." In *Schoneman v. Fegley*,<sup>1</sup> decided by the Supreme Court of Pennsylvania in 1850, a witness testified that he

spective of the purposes for which he (the incoming tenant) may work the land, and whatever the terms between him and his landlord may be, and whether the incoming tenant takes the land for a week, a month, a year, or a long term. 3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is a party to it and assents to it. 4. That in the event of a letting and undertaking, it is (on the custom as stated) uncertain who is to pay, viz., the immediate lessee from the landlord or the ultimate tenant who takes possession. 5. That such a custom would lead any prudent tenant to run his farm out as much as by law he could, and to leave as little as possible for the incoming tenant to pay for. A custom having such consequences as these appears to us so unreasonable, uncertain, and prejudicial to the interests both of the landlords and tenants as to be incapable of being supported in point of law. The argument that it is to the interest of the landlord to secure a solvent tenant, and that consequently the outgoing tenant runs practically little or no risk, does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any of them; for it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury. The reasonableness or unreason-

ableness of a custom is a question of law for the court (see *Tyson v. Smith*, 9 Ad. & E. 421), and not a question of fact for the jury; and the principles applicable to such questions will be found in *Comyns' Digest*, tit. 'Copyhold,' S, and *Tyson v. Smith*, *ubi supra*, and on these principles we proceed. It may, indeed, be said that the custom here condemned is that which prevails in practice all over England, it being well known that, as a matter of fact, the outgoing and incoming tenants usually settle questions of valuation between themselves, without referring to the landlord. This is no doubt true; but if the practice is examined, it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant where there is no contract, express or tacit, between them. See *Faviell v. Gascoigne*, 7 Exch. 273; *Stafford v. Gardner*, L. R. 7 C. P. 242; *Codd v. Brown*, 15 L. T. (N. S.) 536. The custom here found to exist is totally different; it exonerates the landlord from all liability, and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract, express or tacit, between them. There is no inconsistency, therefore, in condemning the custom and upholding the practice, which is based upon a custom wholly opposed to that with which we have to deal." *Lindley, J.*, in *Bradburn v. Foley*, 17 Alb. L. J. 483.

<sup>1</sup> 14 Pa. St. 376.

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did not know whether he had given a receipt for the amount of a note received by him. He was then asked, "Did you not usually give receipts for notes received?" The trial judge refused to allow the question, and the case was appealed. In the Supreme Court, however, the admissibility of the evidence was not discussed, the court remarking that if an error had been committed, it had been cured by a concession made at the trial. In 1867, however, in the case of *Eureka Insurance Company v. Robinson*,<sup>1</sup> the matter came directly before the same court, and was decided in the affirmative. The question was, whether notice of an additional insurance had been given. The witness called to prove the giving of the notice could not say whether he had done so in that case, adding, "It was my custom to do so, to avert any further trouble." He was then asked "whether it was his custom to do so in a case like the present, viz., where he had effected an insurance in one office, and subsequently a new or additional risk in another." The trial court allowed the evidence. On appeal, its ruling was affirmed. STROMG, J., referring to *Schoneman v. Fegley*, said: "It is evident that the matter was regarded of no importance, as in truth it was in that case. No reasons were given for Judge BELL's remark, and no authority in support of it was cited," adding: "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus, a subscribing witness to a will or a bond, if unable to recollect whether he saw the testator or obligor sign the instrument, or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests, or hearing that signature acknowledged, and it seems to be persuasive and legitimate supporting evidence."

But where evidence of this character is offered, not to prove a fact, but to corroborate it, there can hardly be any objection to its admissibility. In *Hine v. Pomeroy*,<sup>2</sup> the question was whether C., the attorney for the plaintiff in a former suit, had directed T., an officer to whom C. gave a writ for service, to take the receipt of M., and not remove the property. T. testified that such directions were given; C., that they were not. It was then proposed to show by C. that his uniform habit as an attorney, in delivering writs of attachment to officers for service, was not to give instructions to them to take receipts, but to abstain from giving any instructions in regard thereto. The trial court refused the evidence, but in the Supreme Court the ruling was reversed. "There was a conflict," said BARRETT, J., "between C. and T.: C. testifying that he did not, against T. testifying that he did. In such cases it is commonly claimed that the testimony of him who testifies affirmatively, that an act was done or an event happened (other things being equal), is less likely to be erroneous, and is more reliable than the testimony of him who testified that such act was not done or such an event did not happen. Ordinarily it is said, and justly, that he who testifies to the negative may have forgotten a fact that actually took place, while he who testifies affirmatively cannot remember a fact that never did take place; and so, upon common principle affecting or governing the credit and weight to be given to testimony thus in conflict, it should rather be held that the one had forgotten than that the other had testified falsely. It seems proper as grounded in sound principle and sanctioned by long usage, that such affirmative facts and

<sup>1</sup> 56 Pa. St. 256.<sup>2</sup> 39 Vt. 311.



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circumstances as are connected with or kindred to the fact in controversy, and so related to it as to affect the conduct or the memory of the witness as to the main fact, may be testified to by him as bearing upon the likelihood of his not having forgotten nor testified mistakenly as to the main fact. It is conceded, and many cases are cited, which show that evidence of the character offered in this case only as corroborative has been received as pertinent and adequate of itself to prove a material fact — as, in the case of subscribing witnesses who have forgotten about having witnessed the execution of a paper in question; as in the case of notices of presentment, protest, and the like, when the witness has no recollection of the fact, but testifies to his uniform habit and course of business in that respect, and to his belief grounded upon it, and thus proves the material fact about which he has no active memory. If such testimony is proper and adequate to prove a material fact, it would seem strange if it should be held not proper, as corroborative of the correctness of the witness who swears by his memory, as to the main and material fact." When the case went back for another trial, the evidence of C. as to his practice was admitted without objection, and the defendants then offered to show that it was the practice of the attorneys of the place, other than C., to give such instructions to officers. The trial court rejected this evidence, and this time the ruling was affirmed in the Supreme Court.<sup>1</sup> In a North Carolina case, as bearing upon the question whether a railroad company had received certain cotton for transportation, and as confirmatory of the statement of the agent that they had not, the company asked the agent whether it was not the custom to weigh and mark goods as they were taken for transportation, — the cotton in question not having been weighed and marked, — but the court ruled out the question. On appeal, this was held error.<sup>2</sup> Where the question is whether a usage exists in a city to inspect a certain kind of provisions, evidence that the rules of a chamber of commerce, having the power given to it by its act of incorporation to appoint an inspector of provisions, and one of the purposes of which was declared to be to "establish and maintain uniformity in the commercial usages of the city," said nothing about the kind of provisions in question, while they provided for the inspection of many other kinds, is admissible to show the non-existence of the usage.<sup>3</sup> In an action against a bank for the amount of a deposit alleged to have been made with the bank on a certain day by the plaintiff, the bank defended on the ground that no deposit was made by him on that day. The cashier swore that no deposit was made by the plaintiff on that day, and was then permitted to add: "It is the universal custom of the bank to balance and settle the books every evening. There was no transaction of the kind. \* \* \* If he (the plaintiff) had made a deposit on that day, I would have entered the deposit in the daily receipts; and this is one reason for my belief that he made no such deposit." This evidence was held proper.<sup>4</sup> Where, in a suit for the loss by fire of a quantity of rice deposited at a mill to be ground, it was proved that the general custom of the mill was to give a receipt to the owner of the rice delivered, stating the quantity and the terms of deposit, it was held that the presumption was that the receipt was so delivered, and that the plaintiff could not

<sup>1</sup> *Hine v. Pomeroy*, 40 Vt. 103.<sup>3</sup> *Kershaw v. Wright*, 115 Mass. 361.<sup>2</sup> *Vaughn v. Raleigh, etc., R. Co.*, 63 N. C.<sup>4</sup> *Meighen v. Bank*, 25 Pa. St. 238.

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resort to proof of the quantity *aliunde* without proof of his inability to produce it.<sup>1</sup> So, where a parol acceptance of a draft was relied upon, evidence that it was the custom of the party in accepting drafts to always do so in writing, and to enter them on his books, was admitted.<sup>2</sup> Evidence that it was the practice of a bank clerk to carry notices personally to parties, is admissible to prove that it was done in a particular case;<sup>3</sup> and the question being as to whether a notice has been mailed by a notary, his habit of doing so is relevant.<sup>4</sup> Abbreviations and symbols in a party's books of account may be explained by evidence of his usage, but not by his secret intent.<sup>5</sup>

§ 47. Cases where this Proof was rejected. — It was disputed between a party and an insurance agent whether a contract of insurance was entered into between them. To corroborate the testimony of the agent, and as tending to show that there was no agreement for insurance completed, the company offered in evidence a book kept by the agent for them, in which he entered all risks taken by him for the company as soon as taken, but in which the risk claimed did not appear. But it was held not admissible. "No authority," said the court, "is cited in support of the proposition that the omission to make an entry of a contract in a book kept by one party is evidence in favor of that party that no contract was made. Such an entry constituted no part of the contract, and the plaintiff had no knowledge of the habit of the defendant's agent in that respect, and could not be affected by it. It was clearly inadmissible."<sup>6</sup> And in a somewhat similar case, evidence that a factor was in the habit of making entries in his books designating what sales were guaranteed and what not, was not competent to prove that he did not guarantee all sales made by him;<sup>7</sup> and the question being whether a bill of sale had been read over to a woman by a justice of the peace, that such was his habit was held irrelevant.<sup>8</sup> In an action of trespass, it was proved that an execution against the plaintiff was delivered to the defendant, but it did not appear that he was the person who made the attachment for which the action was brought. The plaintiff, in order to establish the identity, gave evidence of a custom to deliver executions to the officer making the attachment; and the jury were instructed that if, from this usage, they were satisfied that the defendant made the attachment, they should find for the plaintiff. But the Supreme Court said: "It appears to us that there is no such uniformity in this custom or usage that it can be regarded as evidence to show a particular and substantial fact. The custom of giving out executions within thirty days after judgment is far more uniform than the one alluded to, and we suppose that no one ever relied upon that kind of evidence to charge property in execution. A witness who gave out an execution might

<sup>1</sup> *Ashc v. DeRosset*, 8 Jones L. 240.

<sup>2</sup> *Smith v. Clark*, 12 Iowa, 32.

<sup>3</sup> *Shove v. Wiley*, 18 Pick. 558.

<sup>4</sup> *Trabue v. Sayre*, 1 Bush, 131; *Union Bank v. Stone*, 50 Me. 595; *Miller v. Hackley*, 5 Johns. 383; *Shove v. Wiley*, 18 Pick. 561; *Coyle v. Gozzler*, 2 Cranch C. Ct. 625; *Cookendorfer v. Preston*, 4 How. 317; *Bell v. Hagerstown Bank*, 7 Gill 227. And see *Brailsford v. Williams*, 15 Md. 150.

<sup>5</sup> *Curren v. Crawford*, 4 Serg. & R. 3; *Rowland v. Burton*, 2 Harr. (Del.) 288; *Cummings v. Nichols*, 13 N. H. 420.

<sup>6</sup> *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 443.

<sup>7</sup> *Park v. Miller*, 27 N. J. L. 338.

<sup>8</sup> *Pocock v. Hendricks*, 8 Gill & J. 421. And see *Goodfellow v. Meegan*, 32 Mo. 280.

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rely upon his habit of giving them out in thirty days, and that if he had not in the particular instance, it would have made an impression on his mind to enable him to say he did give it out in thirty days; but the jury could not with propriety be allowed to consider this usage as showing the main fact. It is common to attach property to satisfy the judgment: but that, of itself, would scarcely be sufficient to show an attachment in a particular case. The truth is, this evidence is defective in two particulars: First, it rests upon no settled and reliable uniformity, upon which the jury could safely be allowed to act; second, it presupposes the existence of other evidence, and in the power of the party, which not being produced, ordinarily raises a presumption against the party that if produced it would operate against him."<sup>1</sup>

§ 48. Custom does not make a particular Mode of executing a Contract essential.—Because parties usually execute a contract in one way, a contract executed in another way is not necessarily invalid, if no particular requirements are provided for by statutory enactment. Thus, contracts of insurance are usually written, and generally under seal, and this custom had become so general that even Mr. Duer expressed doubt as to the validity of an oral insurance, the usage of a written contract having so long and universally prevailed; and his doubts were shared by Chief Justice TILGHMAN.<sup>2</sup> But when an oral contract of this character was at last presented to the courts, it was ruled that its validity could not be questioned on the simple ground that people usually made it in another way.<sup>3</sup>

§ 49. Entries made in the usual Course of Business.—The memoranda or book-entries of an officer, agent, or business man, when made in the course of his business, and at or near the time of the transaction, are evidence, after his decease, of the truth of such entries.<sup>4</sup> Particularly are tradesmen's books of original entries receivable in evidence as *prima facie* proof when supported by their oath,<sup>5</sup> though, under the statutes allowing parties to be witnesses, books

<sup>1</sup> Angell v. Keith, 24 Vt. 371.

<sup>2</sup> 1 Duer on Ins. 60; Smith v. Odlin, 4 Yeates, 468.

<sup>3</sup> McCulloch v. Eagle Ins. Co., 1 Pick. 280; Kennebec Co. v. Augusta Ins. Co., 6 Gray, 204; Sanborn v. Firemen's Ins. Co., 16 Gray, 448; Trustees v. Brooklyn Ins. Co., 19 N. Y. 305; Commercial, etc., Ins. Co. v. Union, etc., Ins. Co., 19 How. 318; Hamilton v. Lycoming Ins. Co., 17 Pa. St. 339; Relief Fire Ins. Co. v. Shaw, 4 Otto, 574.

<sup>4</sup> Whart. on Ev., § 238; Abb. Tr. Ev. 322; Best on Ev., § 501; Price v. Earl of Torrington, 1 Salk. 285; Webster v. Webster, 1 Post. & Fin. 401; Doe v. Turford, 3 Barn. & Adol. 860; Bright v. Legerton, 2 De G. F. & J. 606; Rawlins v. Rickards, 28 Beav. 370; Ridgway v. Bank, 12 Serg. & R. 256; Clemens v. Patton, 9 Port. 289; Nicholls v. Webb, 8 Wheat. 326; James v. Wharton, 3 McLean, 492; Beule v. Pettit, 1 Wash. C. Ct. 241; Union Bank v.

Knapp, 3 Pick. 96; Porter v. Judson, 1 Gray, 175; Walker v. Curtis, 116 Mass. 98; Livingston v. Arnoux, 56 N. Y. 518; Gilbert v. Sage, 57 N. Y. 639; Ocean National Bank v. Carll, 55 N. Y. 440; Merrill v. Ithaca, etc., R. Co., 16 Wend. 586.

<sup>5</sup> Ball v. Gates, 12 Mete. 491; Linn v. Naglee, 4 Whart. 92; Winne v. Nickerson, 1 Wis. 1; Sherwood v. Sissa, 5 Nev. 349; Linnell v. Sutherland, 11 Wend. 568; Funk v. Ely, 45 Pa. St. 444; Fitzgibbon v. Kinney, 3 Harr. (Del.) 317; Karr v. Stivers, 34 Iowa, 123; James v. Richmond, 5 Ohio, 338; Morse v. Congdon, 3 Mich. 549; Kerr v. Love, 1 Wash. (Va.) 172; Thomson v. Porter, 4 Strobb. Eq. 58; Burleson v. Goodman, 32 Texas, 229; Forsee v. Matlock, 7 Heisk. 421; Moody v. Roberts, 41 Miss. 74; Bower v. Smith, 8 Ga. 74; Landis v. Turner, 14 Cal. 573; Barr v. Byers, 10 Ark. 398; Hissrick v. McPherson, 20 Mo. 310.

## Entries in the Course of Business.

of original entries have lost a good deal of the importance which formerly attached to them as instruments of evidence. "The statutes allowing parties to testify have revolutionized the practice, by making the party the witness and allowing him commonly to use his book as a memorandum to refresh his memory;<sup>1</sup> but the rule admitting his account as primary evidence, with certain preliminary proof, is still in force,<sup>2</sup> and it is convenient to rely upon it in some cases where the right to read the account, as having refreshed the witness's memory, may be doubtful."<sup>3</sup> It is, therefore, important to note that it is essential to the admissibility of such entries that the books in which they appear are his books of account, kept in the regular course of his business, and that there was a course of dealing between the parties. But a regular account-book is not required; it is sufficient if the instrument has been kept according to the usage of the business or of the party. Thus, in *Kendall v. Field*,<sup>4</sup> the plaintiff's intestate was employed by the defendants to hew timber for them in their woods, and in an action for his services a shingle was offered in evidence, and admitted, on which he had entered from day to day, in the woods, an account of the timber hewed by him each day. "Considering the nature of his employment," said the Supreme Court of Maine, where the case went on appeal, "and the place where he was, and that the shingle contained the daily minutes of the business in which he was engaged, we think it was legally admissible. It was a substitute for a memorandum-book, which answered the purpose at the time, and was, perhaps, as little liable to alteration or erasure, without being detected by the eye, as if made on paper." So, in *Rowland v. Burton*<sup>5</sup> a notched stick was received, with the oath of the party, to prove an account for work and labor, and in other cases the memoranda of sawyers made upon boards and slips of paper, and copied into a book;<sup>6</sup> the original entries of an account for lumber, made upon separate sheets of paper;<sup>7</sup> scraps of

<sup>1</sup> *Henry v. Martin*, 1 W. N. C. 277; *Barnet v. Steinbach*, 1 W. N. C. 335. And see *Nichols v. Haynes*, 78 Pa. St. 174.

<sup>2</sup> *Stroud v. Tilton*, 4 Abb. App. Dec. 243; *Burke v. Wolfe*, 38 N. Y. S. C. (J. & N.) 263.

<sup>3</sup> *Butler v. Cornwall Iron Co.*, 22 Conn. 360; *Larue v. Rowland*, 7 Barb. 107; *Tomlinson v. Borst*, 30 Barb. 46.

<sup>4</sup> 14 Me. 30.

<sup>5</sup> 2 Harr. (Del.) 288. The plaintiff in this case was sworn on the *voir dire* to prove his books, when he produced, as his book of original entries, a small stick, cut and notched in a variety of ways, by which he undertook to prove an account running through two or three years, and consisting of a number of items. He was fully examined, and the accuracy of his entries tested by an account made out from it some time before. They corresponded with the exception of one item, and it was afterwards ascertained that one of the notches had been defaced by the breaking of the stick. The account consisted of thirteen different items, and the court permitted the stick to

go to the jury with the party's oath that the notches were made at the time the work was done; and the plaintiff had a verdict. Wooden tallies were formerly in use in England, even for the keeping of public accounts. Best on Ev., § 298; 3 Pepys' Diary. They continue to be used in this country by bakers and milkmen. Whart. on Ev., § 614, note.

<sup>6</sup> *Davison v. Powell*, 16 How. Pr. 467.

<sup>7</sup> "There are no appearances on the face of the account which make it incompetent. It is in the handwriting of the party, and is a fair statement, in the usual manner of an account, with date, quantity, and price. The entries are proved to have been made at, or nearly at the time that the lumber was delivered. The party kept no clerk, and these were the only entries made of the sale and delivery of the lumber. It was also proven that the plaintiff kept correct accounts. It is objected, however, that there was no book in this case of original entries proven. It is true there was no book proven, but it was proven that the identical

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paper,<sup>1</sup> and a tabular form,<sup>2</sup> have been admitted in evidence. Where there is but a single sale, although that may have included more than one article, books of account cannot be received as evidence of that transaction. They are admissible only where a habit of dealing between the parties is proved.<sup>3</sup>

paper containing the account was the original paper and entries thereon of the party; he kept no other. It is not material whether the entries be made in a book or on a separate sheet. It is only material that they be an account of the dealing between the parties, and be primary and original. \* \* \* The evidence was, that the witnesses had dealings with the plaintiff; that they had settled with him upon presentation of their accounts, and that they found those accounts correct. The exception is, that no book of accounts was proven to have been correctly kept by the plaintiff. If, as we have attempted to show, it is immaterial whether the original entries were kept in a book or on a separate sheet, then it is not necessary to prove that the plaintiff kept correct accounts in a book. The object of this testimony is to fortify the evidence of the plaintiff's original entries, by showing a habit of fair dealing in like transactions with others on his part." Nisbet, J., in *Taylor v. Tucker*, 1 Ga. 231.

<sup>1</sup> *Smith v. Smith*, 4 Harr. (Del.) 532. But see *Jones v. Jones*, 21 N. H. 219.

<sup>2</sup> So long as the rule of law is allowed to prevail that the account-books of a plaintiff, verified by his oath, may be admitted to prove charges for services done and goods sold, much must depend upon the appearance and character of the book offered as evidence, and the view taken of it by the judge who tries the case. It is true that the question whether a book is competent to go to the jury is a question of law; but as the law has prescribed no mode in which a book shall be kept to make it evidence, the ques-

tion of competency must be determined by the appearance and character of the book, and all the circumstances of the case, indicating that it has been kept honestly, and with reasonable care and accuracy, or the reverse. In the present case, the court can perceive no conclusive objection to the admission of a book called a time-book. It is a book kept in a tabular form, in which the days of the month are placed at the head of the column, and the name of the workmen on the side; and at the end of each day, or near it, a figure is put down at the place of intersection, — say, one, one-half, or one-fourth, — indicating thereby that the person has worked the whole or a fraction of that day. It cannot be objected that the time is put down in figures, for that is the case in all modes; nor that it was not an original entry, because that fact must depend, as in other cases, on the oath of the party to prove that it was made at or about the time it purports to be made, and by the proper party. It appears to us to be intelligible, and not more liable to fraudulent fabrication or alteration than entries kept in ledger form, which have been held to be good." *Shaw, C. J.*, in *Mathes v. Robinson*, 8 Metc. 269. And see *Hall v. Glidden*, 39 Me. 445; *Faxon v. Hollis*, 13 Mass. 423; *Jones v. Long*, 3 Watts, 325; *Rodman v. Hoops*, 1 Dall. 85; *Thayer v. Deen*, 2 Hill (S. C.), 677; *Richardson v. Emery*, 23 N. H. 220.

<sup>3</sup> *Corning v. Ashley*, 4 Denio, 354; *Vosburgh v. Thayer*, 12 Johns. 461; *Case v. Potter*, 8 Johns. 211; *Linnell v. Sutherland*, 11 Wend. 568.

## CHAPTER II.

### ON THE PROOF NECESSARY TO ESTABLISH THEM.

#### ILLUSTRATIVE CASES:—

8. *Parrott v. Thacher*. — A single witness insufficient if contradicted.  
9. *Fleet v. Murton*. — Proof of usages of other trades.

#### NOTES: § 50. General customs are judicially noticed.

51. But particular usages and customs must be proved.  
52. Burden of proof — Custom must be proved.  
53. A single witness may prove a custom.  
54. But not if his testimony be contradicted.  
55. Mode of proving usages and customs — Testimony of witnesses.  
56. Same — Adjudged cases.  
57. Who may be called as witnesses.  
58. Order of proof — Proper questions.  
59. Quantum of evidence.  
60. Law and fact.  
61. Evidence of customs in different places or in other trades.  
62. Customs must be construed strictly.  
63. Conflict of laws.  
64. Pleading.

#### 8. A SINGLE WITNESS INSUFFICIENT IF CONTRADICTED

##### PARROTT *v.* THACHER.\*

*In the Supreme Judicial Court of Massachusetts, March Term, 1830.*

HON. ISAAC PARKER, *Chief Justice*.

“ SAMUEL PUTNAM,  
“ SAMUEL S. WILDE, } *Judges.*  
“ MARCUS MORTON, }

A usage of a particular business is not sufficiently proved by the testimony of only one witness to support it, where another witness, equally familiar with the business, denies it, and where other witnesses on the subject might be had.

This was *assumpsit* for goods sold and delivered, and on the following note, viz.: “For value received in N. E. rum, for use of myself and owners of brig *Ida*, I promise to pay Horace Scudder, or order, 519

\* Reported 9 Pick. 426.



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dollars 53 cents, on demand, with interest after six months. For myself and owners of brig *Ida*. Feb. 28, 1828. ALLEN HALLETT." The note was indorsed by Scudder to the plaintiffs, without recourse. The note also contained an indorsement by Scudder acknowledging the receipt of \$163.67, "being net account of sales of 38 barrels of gin, after deducting 100 dollars, amount of an order accepted to pay Joseph Swan out of the proceeds of said gin."

At the trial, before WILDE, J., it was admitted that the defendants and Allen Hallett were joint owners of the brig *Ida*, which was built to run as a regular packet between the ports of Boston and Baltimore. Scudder, being called as a witness by the plaintiffs, testified that he, being a commission merchant in Boston, sold a quantity of New England rum belonging to the plaintiffs to Hallett, who was the master of the *Ida*, on the credit of her owners; that the rum went on board of her; that he took the note in payment; that he, Stanton, Fiske, Nichols, and the defendant Thacher were agents to procure freights and passengers for the *Ida*; that it had been a general practice for masters of vessels in this business to take up goods on account of the owners, when a full freight could not be procured; that Hallett proceeded in the *Ida* to Baltimore, where, failing to sell the rum, he shipped it to Charleston, where he exchanged it for thirty-eight barrels of gin, which he shipped to Boston, and which, on its arrival, was placed by Warren Hallett, a brother of Allen Hallett, and one of the defendants, in the witness's hands to sell on account of their note, and that he accordingly sold the same, and made the indorsement of the proceeds on the note. Allen Hallett died on his passage from Charleston to Boston.

On cross-examination, this witness stated that there was an understanding between him and Allen Hallett that the proceeds of the rum should be sent to him, though there was no strict bargain to that effect. He admitted that he never consulted with the defendant Thacher, who resided in Boston, and was known to him to be one of the owners, as to the sale of the gin or the purchase of the rum by Allen Hallett, and that Thacher never had notice of the note until after Allen Hallett's death, and was not called on to pay the balance due upon it until after Allen Hallett's estate had been represented to be insolvent. The witness said that he expected that the note would have been paid by Allen Hallett, and therefore did not apply to the owners. He also testified that Allen Hallett, some time before he was in the *Ida*, had been master of the *Helen*, which belonged to the Union Line of Baltimore packets, and that he had several times sold him goods on the credit of the owners, which goods had gone to the credit of the concern, and the pur-



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cases had been ratified by them; but that he did not know that the purchase of rum in this case was known to the owners of the *Ida* at the time it was made. He supposed, however, though he did not certainly know, that it was known to Warren Hallett at the time he put the gin into his hands. Here the plaintiffs rested their case.

The defendants called Francis Stanton as a witness, who testified that he had been concerned in the lines of packets between Boston and Baltimore, and Boston and New York, for fifteen or twenty years; that the house of Stanton, Fiske & Nichols, to which he belonged, had been during that period agents for those lines of packets, and still were for the New York packets; that he had never known the masters of these vessels take up goods on the credit of the owners in Boston, or any other port; and that there was not, to his knowledge, any such general usage or practice. He said, however, that it was usual in the Union Line to permit masters, when they had short freight, to purchase flour and other merchandise out of the stock, which consisted of funds on hand derived from the earnings arising from freight and passengers and profits of these purchases, but not to make purchases on credit, or otherwise than with the stock; and that the stock so purchased belonged to the owners.

The judge instructed the jury that unless they were satisfied, from the evidence, that Allen Hallett was expressly or impliedly authorized by the defendants to purchase the goods for them, or on their credit, the plaintiffs had not maintained their action; and that the burden was on the plaintiffs to prove that Hallett had that authority. The jury were also instructed that, there being no express evidence of such authority, they should find for the defendants, unless they were satisfied that there was some usage of trade authorizing the master to bind his owners, or that the goods purchased came to the use of the owners.

The jury returned a verdict for the plaintiffs for the balance due on the note, deducting the indorsement of \$163.67, with interest. On inquiry, the foreman stated that the jury had rendered their verdict on the ground of a general usage of masters of packets in this line to purchase goods on the credit of their owners; but another jurymen stated that he and some of the rest were of opinion that there was sufficient evidence to prove that the rum came to the use of the defendants.

The defendants moved for a new trial, because the verdict was against both law and evidence; and they also excepted to the verdict on the ground that the \$100 paid to J. Swan, being part of the proceeds of the gin, ought to have been applied towards payment of the note.

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*Warner*, for the defendants, contended that the verdict was against the evidence. No express authority for Allen Hallett to make the purchase on the credit of the owners was proved. Such an authority was not incident to him merely as the master of the vessel. The usage attempted to be proved is unreasonable, because the right of purchasing goods is not necessary for effecting the business for which masters of vessels are appointed. Besides, the evidence does not prove the usage.

*Curtis*, *contra*, to show that the court ought not to grant a new trial where there was evidence on both sides, cited *Hammond v. Wadhams*<sup>1</sup> and *Brooks v. Barrett*.<sup>2</sup>

PARKER, C. J., delivered the opinion of the court.

We are of opinion that there must be a new trial in this case, on account of the defect of evidence to prove that Capt. Hallett was authorized by the owners of the vessel to make purchases and give promissory notes for them.

There being no express authority, it was supposed to be implied from the usage of this particular trade, or because the rum purchased went to the use of the owners, or because there was a knowledge of the purchase on their credit and an acquiescence in it, none of which facts are made out by evidence sufficient to authorize the jury to find a verdict for the plaintiffs.

In regard to usage, it is proved only by the evidence of Scudder; and even his testimony hardly proves it, for he says it was a general practice among masters of vessels in this line of business to purchase goods on the credit of their owners when there was a deficiency of freight. Such a practice may exist short of a usage. And it should seem, when he comes to particularize, that his knowledge of that practice was derived from his transactions with another line of packets, where it may have existed, and not with this line. Such a practice may have existed among masters of vessels, and yet the owners may never have assented to it; and without such assent the practice would not bind them. In the case of the Union Line of packets, to which the practice mentioned in this testimony had relation, he says that the property purchased by the masters went into the accounts of the concern, and the purchases were ratified by them. This is a case without any such account, and without any ratification. But, suppose that the amount of his testimony was that there was such a usage, we think it not sufficiently proved. Usage is a thing which must be public and notorious — at least known to all masters of packets in this trade. Scudder stands alone in his testi-

<sup>1</sup> 5 Mass. 354.

<sup>2</sup> 7 Pick. 96.

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mony, and is directly contradicted by Stanton, an owner, and agent of the Union Line of packets. These witnesses may be supposed equally intelligent and honest. Stanton may have had a bias against establishing a usage which might render him liable. Scudder was interested as a commission merchant, to avoid the charge of negligence in selling the plaintiffs' goods to a man unable to pay. Now, here is a subject of common knowledge proved by one witness and contradicted by another. It is not the case of a fact proved by the testimony of one witness and contradicted by another, in which the jury may prefer positive to negative evidence. When the question is of a custom or usage, and it is not known to those who from their business and connections have the best means of knowing it, ignorance of it is, in some sense, positive testimony that it does not exist.

Suppose the question to be as to the existence of a usage of trade in some foreign port, according to which the rights of parties are to be decided, and that there are two foreign witnesses, both merchants belonging to the place and dealing in the same business, and one testifies in support of the usage and the other against it — can it be said that the usage is proved, especially if other merchants from the same place are here, and have not been called upon?

Now, the usage in question is said to exist at home, and probably there were many masters of packets, and others, in port who would know if it existed. In such case, we think the fact is not made out so as to require a comparison of evidence; that, under such circumstances, one witness is not sufficient to prove the existence of a usage of trade of a somewhat extraordinary nature, to wit: that the owners of vessels are to be bound for all purchases made by the masters.

But there is another sufficient reason for granting a new trial. The jury do not appear to have decided upon either of the points upon which, according to the charge, their verdict was to rest. The foreman stated that they were satisfied with the proof of the usage; a juror said that he and some others were of opinion that the rum purchased had come to the use of the owners; from which it is to be inferred that he and those for whom he spoke were not satisfied in regard to the usage. We certainly do not mean to encourage the practice of questioning jurors as to the grounds of their opinions; but where there are distinct grounds upon which the verdict may be given, perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one, and sufficient upon another; and if it appears that they did not agree upon either of the grounds, I do not see how their verdict can stand, unanimity being required. If there are three distinct grounds

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upon which an action can be maintained, all independent of each other, and four only of the jury agree upon each, I do not see how they can amalgamate their opinions, and make a legal verdict out of them. With regard to the opinion which some of the jury adopted, to wit, that the rum for which the note was given went to the use of the owners, we do not see the least evidence to support it. No account was produced on trial showing any charge or credit to the owners. Scudder expressly states that he had no communication with Thacher respecting the rum, the gin which was taken for some of it which was sold, or the note given by the master. He had some suspicion that Hallett, the brother of the captain, knew of the transaction, because he committed to him the gin to sell; but there was quite as much reason to entertain a contrary supposition, as Thacher would have been likely to take charge of any property which proceeded from goods belonging to the owners. It being very apparent that the subject was not deliberately considered by the jury, and if a usage existed of the kind supposed, it being quite easy to prove it satisfactorily, we think a new trial must be had.

*New trial granted.*

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 9. PROOF OF USAGES OF OTHER TRADES.

## . FLEET v. MURTON.\*

*In the English Court of Queen's Bench, November, 1871.*

SIR ALEXANDER JAMES EDMUND COCKBURN, Bart., *Chief Justice.*

" COLIN BLACKBURN, Kt.,	} <i>Judges.</i>
" JOHN MELLOR, Kt.,	
" ROBERT LUSH, Kt.,	
" JAMES HANNEN, Kt.,	
" JOHN RICHARD QUAIN, Kt.,	

M. & W., fruit-brokers in London, being employed by F. & D., merchants in London, to sell for them, gave them the following contract note, addressed to F. & D.: "We have this day sold for your account to our principal \* \* \* tons of raisins. M. & W., brokers." The principal having accepted part of the raisins, and not having accepted the rest, F. & D. brought an action on the contract against M. & W., and sought to make them personally liable by the custom of the trade. On the trial, in addition to evidence of a custom in the London fruit-trade that if brokers did not give the names of their principals in the contract they were held personally liable, although they contracted as brokers for a principal, they offered evidence of a similar custom in the London colonial market. *Held*, that the latter was also admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade.

\* Reported L. R. 7 Q. B. 126; 1 Moak's Rep. 32.

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**DECLARATION:** That on the 30th of October, 1869, plaintiffs and defendants agreed that plaintiffs should sell to defendants, and defendants should buy of plaintiffs, fifty to seventy tons of raisins at a certain price; that defendants, having accepted part, refused to accept the residue of the raisins according to the contract. Pleas, *inter alia*, that defendants did not agree as alleged. Issue joined.

At the trial before BLACKBURN, J., at the Sittings in London after Michaelmas Term, 1870, it appeared that the plaintiffs, Messrs. Fleet & Dobbing, are merchants in London, and the defendants, Messrs. Murton & Webb, are brokers in the fruit trade in London. The defendants were employed in October, 1869, by the plaintiffs, to sell for them certain consignments of raisins, and the defendants handed to the plaintiffs the following contract note:—

“Messrs. Fleet & Dobbing.

“LONDON, 30th of October, 1869.

“We have this day sold for your account to our principal, to arrive *per* steamer from Trieste, fifty to seventy tons of good, sound, Chesne raisins in cases, at 41s per cwt, usual market terms. Cash on delivery. F. & D. to draw on M. & W. for £500 (if required) on landing, handing equal value. Customary allowances.

“MURTON & WEBB, Brokers, 25 Mincing Lane.”

The defendants had purchased on behalf of Demetrius Pappa, and part of the raisins were accepted and paid for by him through the defendants; but becoming embarrassed, he refused to receive any of the other consignments, upon which, on the 1st of December, 1869, the defendants wrote to the plaintiffs informing them that Mr. Demetrius Pappa was the buyer under the contract of the 30th of October, 1869, and that he refused to receive any more of the raisins; to which the plaintiffs replied that the buyer was bound to receive the whole, and that they knew nothing of Pappa, whose name the defendants now furnished, as the plaintiffs' contract was with the defendants themselves.

In order to make the defendants personally liable on the contract evidence was tendered on behalf of the plaintiffs that in the London fruit-trade, if the brokers do not name their principal in the contract note itself, the brokers are held personally responsible on the contract. And evidence was also tendered of a similar custom in the London colonial market, viz.: that the brokers are held personally responsible, unless they give the name of their principals, in writing, within three days after making the contract. Both classes of evidence were received by the learned judge, after objection by the defendants' counsel, and the jury found that the custom was proved.

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Fleet v. Murton.

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A verdict passed for the plaintiffs (the amount to be afterwards settled), with leave to move to enter a verdict for the defendants, or a nonsuit, if the court should be of opinion that evidence of custom was not admissible.

A rule was obtained, accordingly, to enter a verdict for the defendants, or a nonsuit, on the ground that the evidence of custom was not admissible to add to, alter, or vary the contract; or for a new trial, on the ground that evidence of the custom in the colonial market was not admissible.

*H. James, Q. C., and Cohen* showed cause. — The first point, as to the admissibility of evidence of a custom in the particular trade whereby the broker is held personally liable on the contract unless he discloses his principal's name, is concluded by the authority of *Humfrey v. Dale*.<sup>1</sup> This custom is clearly not inconsistent with the written contract within that case. Nor is it any answer to say that to hold the defendants liable would be to make two principals in the contract: that double liability occurs whenever a broker contracts for an undisclosed principal.<sup>2</sup> But the true answer to any difficulty as to the written contract is this: The contract between the plaintiffs and defendants is the contract of employment, not the contract of sale, and the custom is attached to the employment.

[BLACKBURN, J. — That is how it has always struck me; but then the declaration should have been on the contract, as evidenced by the custom, in a count similar to a count in a *del credere* commission.]

The court has full power to amend. Secondly, the evidence as to the custom in the colonial trade was admissible as evidence in an analogous trade in the same place. In *Noble v. Kennoway*,<sup>3</sup> the contract relating to Labrador, evidence was admitted of the custom in Newfoundland as to similar voyages in the fishing trade. *Falkner v. Earle*<sup>4</sup> is a similar decision as to different or new ports in the same country.

*Murphy*, in support of the rule. — The custom here contradicts the contract, for the name must be given on the face of the contract, otherwise the broker is to be taken as principal; which distinguishes the case from *Humfrey v. Dale*. *Fairlie v. Fenton*<sup>5</sup> is directly in point for the defendants. Secondly, no foundation was shown for the admission of the evidence of the custom in the colonial trade; there was no evidence that the two trades were in any way analogous. In *Noble v.*

<sup>1</sup> 7 El. & Bl. 266; 26 L. J. (Q. B.) 137; s. c. in Exchequer Chamber, El. Bl. & El. 1004; 27 L. J. (Q. B.) 390.

<sup>2</sup> *Higgins v. Senior*, 8 Mee. & W. 834; *Calder v. Dobell*, L. R. 6 C. P. 480.

<sup>3</sup> 2 Doug. 510

<sup>4</sup> 3 Best & S. 360; 32 L. J. (Q. B.) 124.

<sup>5</sup> L. R. 5 Exch. 169.



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*Kennoway* the trades of Labrador and Newfoundland were identical, both being the fishing trade. To hold that this evidence was admissible will be to go further than any case has yet gone.

COCKBURN, C. J. — I am of opinion that this rule must be discharged. I quite agree in the propriety and soundness of the decision given by the Court of Exchequer in the recent case of *Fairlie v. Fenton*, where the plaintiff contracted as a broker for the principal named, for in that case the principal was named; and I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting as broker for a principal, and not for himself as principal; and in that case, also, the broker would not be liable on the contract if the principal failed to fulfil his contract. But I think, nevertheless, that the evidence of the custom was admissible, and that after that evidence had been given, the brokers were properly held liable on the contract. For, although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet if a man — though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself — chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another and giving to another rights under the contract, he himself will incur the same liability as his principal. Now, although where a party professes to contract as broker it might *prima facie* be taken that he contracts without the intention of incurring liability on his own part, yet if by the custom of that particular trade there is that qualification of the contract [which, if written into the contract *in extenso*, would undoubtedly bind him], that qualification may, I think, be imported into the contract by evidence of the custom. In the case of *Fairlie v. Fenton* there was no qualifying circumstance like the custom in the present case. The defendants here undoubtedly call themselves “brokers,” acting for their principal. But if the custom attaches, the non-liability which would, under ordinary circumstances, *prima facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade, evidence of which, according to all principles, is admissible to qualify the terms of a contract where not inconsistent with it.

I am of opinion, therefore, that the evidence of custom in the particular trade was properly received by my brother BLACKBURN to fix the liability of the defendants.



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I own I entertain somewhat more doubt as to the admissibility of evidence of a similar custom in other trades than in the particular trade which was the subject-matter of this contract. This case seems to me to go further than the case of *Noble v. Kennoway*,<sup>1</sup> which related to the admissibility of evidence of custom in the trade of Newfoundland as applicable to the custom of the trade in Labrador. Labrador had been recently annexed to Newfoundland,<sup>1</sup> and the trade in each was of the same description, it being a trade that related to fishing. By the terms of the contract (a policy of insurance), the ship was to be at liberty to call at Newfoundland, and it might be fairly inferred by persons entering into a contract with reference to the trade of Labrador that what was the custom of the trade of Newfoundland would extend to the trade of Labrador. But this case goes further. At the same time, it is impossible to shut one's eyes to the fact that the moral effect of the evidence would operate on a reasonable mind with very considerable force. If there exists a custom to the effect that the agent makes himself liable, under given circumstances, in a large and extensive trade like the colonial trade, it makes it more probable that in the fruit trade in the Mediterranean, or elsewhere, a similar custom would obtain. I am not quite so clear on the point, but still I do not think that the argument addressed to us goes so far as to show that this evidence was not admissible. There is no doubt that it would be useful in elucidating the truth; and therefore, on general principles, I think the evidence was admissible, and I concur with the judgment which my learned brothers are about to pronounce.

BLACKBURN, J. (after deciding the first point). — Now, passing from that point, we have to consider whether the evidence of custom in the colonial trade was admissible; and I am bound to say that I clearly think it was. The objection taken was, that there was no evidence to make the defendants, the brokers, responsible at all. Then the plaintiffs' counsel said: "I will prove by evidence of persons connected with the fruit trade that the broker, where he does not disclose the principal's name, makes himself personally liable." The plaintiffs accordingly offered evidence to prove such a custom, and, to strengthen

<sup>1</sup> The disputed territories of Newfoundland and Labrador were ceded by the French to the English by the treaty of Utrecht, in 1713, and this cession was finally affirmed by the treaty of Paris, in 1763; and in October of that year Labrador was annexed to the government of Newfoundland by royal proclamation. In 1774, by 14 Geo. III., c.

83, Labrador was made part of the then province of Quebec, and afterwards, in 1791, on the division of that province into Upper and Lower Canada, it became part of the lower province. Finally, in 1809, by 49 Geo. III., c. 27, § 14, Labrador was reannexed to Newfoundland.

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the evidence, showed that in the colonial trade brokers did incur a personal liability if they did not disclose their principal's name. What was proved was this: that the trades were very closely allied to each other. All brokers are very closely connected with each other; they all deal with merchants, and with much the same merchants, in the general way of business; and they buy and sell, sometimes fruit, sometimes wool, and sometimes other things. And it struck me, where the question was, Does a broker in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence? that it would be proper evidence for a jury to consider and weigh that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability. I think it cannot be denied that any sensible person would say that the existence of such a liability in the colonial trade as was established in *Humfrey v. Dale*<sup>1</sup> would be very cogent evidence as to whether there would be such a liability in the fruit trade. That is the reason — because I thought it would have this strong bearing on the case — that I left it to the jury. I quite agree that the case of *Noble v. Kennoway*<sup>2</sup> bears but slightly upon the point. It is to some slight degree analogous, but very slightly indeed, and there is no other authority cited at all; therefore, we must go on the principle of common sense. This point was not reserved; but if the defendants go to error on the other main point, they ought to have leave to take this point also.

MELLOR, J. — I am of the same opinion. I do not propose to add anything as to the first two points, because I think they have been conclusively disposed of by my lord and my brother BLACKBURN. But with reference to the last point, as to the admissibility of the evidence of the custom in the colonial trade, which is a new point, so far as I am aware, I think this case goes further than any case has actually gone; yet I cannot help thinking that the evidence was relevant to this case, and admissible on the ground that, showing, as it did, what was the custom in other trades, — though not so analogous, no doubt, to the trade in question as was the trade in *Noble v. Kennoway*,<sup>3</sup> — it tended to show the probability that in the fruit trade as well as in the colonial trade the broker did, under given circumstances, undertake a similar responsibility

*Rule discharged.*

<sup>1</sup> *Supra*, p. 92.

<sup>2</sup> *Supra*, p. 92.

<sup>3</sup> *Supra*, p. 92.

## Judicial Notice.

## NOTES.

§ 50. **General Customs are judicially noticed.**—General customs of the country and the general customs of merchants are judicially noticed by the courts; having become a part of the law, and having been recognized by prior decisions, subsequent judges are bound to know them.<sup>1</sup> In *Gregory v. Wendell*,<sup>2</sup> which was an action growing out of an "option" contract, the court, after remarking that the books drew many nice distinctions as to the right of a person to sell personal property not at the time owned by him, but which he intended to go into the market and buy, said: "Courts must, however, from necessity, recognize the methods of conducting and carrying on business at the present day, and, applying well-settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy." So, the courts have taken judicial notice of a mercantile custom under which mercantile establishments furnish each other's clerks or customers with goods, and charge them to each other;<sup>3</sup> of a public usage to fish in private ponds unless the owner has given public notice that it will not be allowed,<sup>4</sup> and of a church to keep a record;<sup>5</sup> and courts will take judicial notice of the custom of brokers, as part of the general custom of merchants.<sup>6</sup>

The usage of "banking hours" is said by Mr. MORSE<sup>7</sup> to be the only banking usage which has ever been judicially taken notice of by the courts. That portion of the day in which only banks transact business with the public—generally the same with all banks in the same city or town—is well understood by the public, who must be ready within those hours, and the courts will take notice of it without proof, provided the place is within their jurisdiction; otherwise the hours must be proved.<sup>8</sup> Yet a custom to do certain acts after those hours may be shown.<sup>9</sup> And other customs have been judicially noticed—as, the usage of bankers to allow their depositors to withdraw their funds in parcels, and to permit them to make an assignment, as by check, of a portion of the amount to their credit.<sup>10</sup>

§ 51. **But particular Usages and Customs must be proved.**—On the other hand, courts take no notice of local and particular usages, but they must be proved, like other facts, and necessarily by parol evidence.<sup>11</sup> The usages of banks in regard to the mode in which current deposits and the proceeds of notes and

<sup>1</sup> *Davis v. Hanly*, 12 Ark. 645; *United States v. Arredondo*, 6 Pet. 715.

<sup>2</sup> 39 Mich. 337.

<sup>3</sup> *Cameron v. Blackman*, 39 Mich. 108.

<sup>4</sup> *Marsh v. Colby*, 39 Mich. 626.

<sup>5</sup> "We must take notice of a usage so general as that of a church to keep a record." *Shaw, C. J.*, in *Sawyer v. Baldwin*, 11 Pick. 492; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. 282.

<sup>6</sup> *Jones v. Peppercorne*, 23 L. J. (Ch.) 158.

<sup>7</sup> *Morse on Banks*, 433.

<sup>8</sup> *Parker v. Gordon*, 7 East, 385; *Jameson*

*v. Switon*, 2 Taun. 225; *Hare v. Henty*, 10 C. B. (N. S.) 65; *Calisher v. Forbes*, 41 L. J. (Ch.) 78; *Salt Springs National Bank v. Burton*, 58 N. Y. 430.

<sup>9</sup> *Marshall v. American Express Co.*, 7 Wis. 1.

<sup>10</sup> *Munn v. Burch*, 25 Ill. 35.

<sup>11</sup> *Eager v. Atlas Ins. Co.*, 14 Pick. 141; *Gordon v. Little*, 8 Serg. & R. 557; *Snowden v. Warner*, 3 Rawle, 101; *Smith v. Wright*, 1 Caines, 44; *Ward v. Everett*, 1 Dana, 429; *Senac v. Pritchard*, 4 La. 160; *Merchants' Mutual Ins. Co. v. Wilson*, 2 Md. 217.

One Witness Sufficient.

drafts placed with them for collection are paid, cannot be judicially noticed, but must be proved.<sup>1</sup> Nor can a court take judicial notice of a custom in a city, in improving streets, first to regulate and grade, and then to pave, as separate and distinct works.<sup>2</sup>

The usages of another State may be proved by witnesses.<sup>3</sup>

§ 52. **Burden of Proof—Customs must be proved.**—The custom must be proved by the party setting it up; the burden is on him.<sup>4</sup> It must be clearly proved. "Doubt must be wholly eliminated from the evidence adduced, or the usage is not well proved."<sup>5</sup> Therefore the custom must be given in evidence, and may not be left to be found by the jury from their own familiarity with business affairs. In a Texas case,<sup>6</sup> the judge, in charging the jury, said: "I am not familiar with this custom of merchants in settling with insurance offices, or what are the liabilities of insurers in case of partial loss. I see on the jury planters and merchants, who doubtless are familiar with transactions of this kind; you will apply the rules of the same to the nature of this kind of transaction." The Supreme Court held this erroneous, because, so far as the transaction was governed by law, it belonged to the judge to declare the law, and so far as it rested on custom, the custom was a fact to be given in evidence to the jury. "The custom," said LIPSCOMB, J., "was not dependent on the knowledge any particular juror might have of such custom. If this were permitted, each juror might assume to know of his personal knowledge what the custom was, and no two of them agree. If it was supposed that such knowledge was possessed by any one or more of the jurors, it was perfectly competent to make witnesses of such jurors; they would then be in the hands of each party, to ascertain the means of acquiring a knowledge of such fact on the part of the juror. The oath of a juror will not permit him to find a verdict on what he may think he knows, of himself; because then he would be passing on evidence known to himself, and not to his fellow-jurors."

§ 53. **A single Witness may prove a Custom.**—It has been much debated whether the existence of a usage or custom can be sufficiently proved by the testimony of a single witness. In *Wood v. Hickok*,<sup>7</sup> decided by the Supreme Court of New York in 1829, SUTHERLAND, J., after disposing of the case on other grounds, added: "The testimony of one of the witnesses that it is the uniform practice of grocers to charge interest on goods sold, after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade of which all dealers in that line are bound to take notice and are presumed to be informed." This expression, as said in *Vail v. Rice*,<sup>8</sup> appears to have been casual, was not upon a point at issue in the cause, and does not conflict with the proposition that the testimony of one witness who has adequate means of knowledge may be sufficient to prove the existence of a usage in a given trade or business. Nevertheless, in a South Carolina case it is

<sup>1</sup> Planters' Bank v. Farmers', etc., Bank, 8 Gill & J. 449.

<sup>2</sup> Re Walter, 75 N. Y. 354.

<sup>3</sup> McNeill v. Arnold, 17 Ark. 154.

<sup>4</sup> Caldecott v. Smythies, 7 Car. & P. 808.

<sup>5</sup> Adams v. Pittsburg Ins. Co., 76 Pa. St. 411.

<sup>6</sup> Green v. Hill, 4 Texas, 465.

<sup>7</sup> 2 Wend. 501.

<sup>8</sup> 5 N. Y. 155.

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 One Witness Sufficient.
 

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held that one witness is not enough.<sup>1</sup> In Alabama, while it is intimated in several cases that one witness is insufficient to prove a usage,<sup>2</sup> the correct rule is stated by COLLIER, C. J., in a case decided in 1846: "If a single witness testifies fully and explicitly to the existence of a usage, and is not contradicted by opposing evidence, we should think that it could not be assumed as a legal conclusion that the proof was insufficient."<sup>3</sup> And in another case STONE, J., said: "We cannot lay it down as a positive rule that more than one witness is required to prove the existence of a custom or usage, before such usage or custom can become an element of contracts. No statute has prescribed such rule, and we are not able to perceive in the nature of the question a necessity for so radical a departure from general principles."<sup>4</sup> In an early case in the Federal courts,<sup>5</sup> Mr. Justice WASHINGTON ruled that a single witness was insufficient to establish a usage; but there the discussion seems to be set at rest by the case of *Robinson v. United States*,<sup>6</sup> decided in the Supreme Court of the United States in 1871, in which it is said: "It is objected that the usage was proved by a single witness. But we cannot assert as a rule of law governing proof of usages of trade that if a single witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration, and universality of the usage, and is uncontradicted, the usage cannot be regarded by the jury as established." In *Thomas v. O'Hara*,<sup>7</sup> decided in South Carolina in 1817, a new trial was granted because the evidence of one witness called in the court below to prove a custom was rejected. In *Vail v. Rice*,<sup>8</sup> the court held that the usage in question might be proved by only one witness, remarking that there was nothing in the character of the fact that a usage in a given branch of trade exists which renders it important that such fact should be established by more than one competent witness. *Jones v. Hoeg*,<sup>9</sup> decided in Massachusetts in 1880, is to the same effect; and in many other cases the testimony of a single witness called to prove a usage has been received without objection or comment.<sup>10</sup> The weight of authority, as well as sound reason, is against the rulings in those cases where one witness was held, as a matter of law, incompetent to establish a usage. Cases might often arise in which the administration of justice would be needlessly delayed if two or more witnesses were inexorably required. When only one witness is called to establish the fact of a usage, the duty of a court and jury will always lead to an inquiry and examination into the circumstances; and if his single testimony is not satisfactory, it will not be allowed to prevail. The question whether the testimony of one witness to such a fact is sufficient, may be safely left in every case to the court and jury.

§ 54. But not if his Testimony be contradicted. — The principal case of *Parrott v. Thacher*<sup>11</sup> did not decide that one witness is not enough to prove a

<sup>1</sup> *Halwerson v. Cole*, 1 Spears, 321.

<sup>2</sup> *Price v. White*, 9 Ala. 563; *Jewell v. Center*, 25 Ala. 498; *Smith v. Rice*, 56 Ala. 417.

<sup>3</sup> *Marston v. Bank of Mobile*, 10 Ala. 284.

<sup>4</sup> *Partridge v. Forsyth*, 29 Ala. 200.

<sup>5</sup> *Barclay v. Kennedy*, 3 Wash. C. Ct. 350.

<sup>6</sup> 13 Wall. 363.

<sup>7</sup> 1 Mill Const. 303.

<sup>8</sup> 5 N. Y. 155.

<sup>9</sup> 128 Mass. 585.

<sup>10</sup> *Bissell v. Ryan*, 23 Ill. 566; *Pittsburg v. O'Neill*, 1 Pa. St. 342; *Sewell v. Corp.*, 1 Car. & P. 372; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Cohea v. Hunt*, 2 Smed. & M. 227; *Miller v. Insurance Co.*, 1 Abb. N. C. 470.

<sup>11</sup> *Ante*, p. 85.

## Mode of Proof.

usage, but simply ruled that under the circumstances there shown—there being a conflict on the point, and other testimony being easily obtainable to support the usage—the single witness was insufficient. The testimony of one witness stands until contradicted; but then, if the opposing witness has equal means of knowledge and appears equally worthy of belief, the burden of proof being upon the party setting up the custom to establish it, his proof must necessarily fail. In several cases, therefore, the evidence adduced has been considered as too conflicting to establish the custom endeavored to be shown, and it has failed for that reason.<sup>1</sup> Therefore, if the custom is likely to be disputed, it will be necessary for the practitioner to have additional evidence; and even were there no such fear, it would be safer, as an appellate court would probably never interfere with the verdict of a jury which had refused to recognize a usage proved by the testimony of but one witness.<sup>2</sup>

§ 55. *Mode of proving Usages and Customs—Testimony of Witnesses.*—In considering the *mode* of proof of usage and custom, there is a distinction to be noted between those cases in which the legal liability of the parties is sought to be affected by a usage of trade, and those in which the object is simply to ascertain the sense in which certain words or mercantile terms are used in commercial contracts.

(a.) A usage of trade cannot be proved by the opinion of witnesses as to the law, or as to what should be the rule. The witness or witnesses must testify to the *existence* of the usage. The custom of merchants, or mercantile usage, does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions publicly expressed, but it depends upon their acts. The inquiry is not into the opinions of traders and merchants as to the law upon a mercantile question, but for the evidence of a fact, viz.: the usage or practice in the course of mercantile business in the particular case.<sup>3</sup> Therefore, in an

<sup>1</sup> *Rushforth v. Hadfield*, 6 East, 522; *Holderness v. Collinson*, 7 Barn. & Cress. 202; *Lewis v. Marshall*, 7 Man. & G. 729; *Green v. Farmer*, 4 Burr. 2221; *Haskins v. Warren*, 115 Mass. 514; *Winthrop v. Union Ins. Co.*, 2 Wash. C. Ct. 7.

<sup>2</sup> *Thomas v. Graves*, 1 Mill Const. 308; *Treadway v. Sharon*, 7 Nev. 7.

<sup>3</sup> *Allen v. Merchants' Bank*, 22 Wend. 45. "The inquiry in these and the like cases, however, is not after the opinion of traders and merchants in respect to the law upon a given mercantile question, but after the evidence of a fact, to wit: the usage or practice in the course of mercantile business in the particular case. Independently of this usage, merchants are no more permitted by courts to testify to the commercial law than other individuals. Their understanding of the usage is given, which usage may be the rule of the case to be decided." *Nelson, J.*, in *Allen v. Merchants' Bank*, 15 Wend. 482; *Carvick v. Vickery*, 2

*Doug.* 653. "The proposition to prove the legal effect of a written instrument by the opinion of merchants is a novelty. Possibly if these words, 'sailed on or about' a given day, had acquired any meaning in trade or commerce different from their ordinary import, evidence to that effect might have been admissible, but that was not the offer." *Hawes v. Lawrence*, 3 Sandf. 193; *s. c.* 4 N. Y. 345. "A custom must be proved by evidence of facts, and not by mere speculative opinions, by means of witnesses who have had frequent and actual experience of the custom. The testimony of those who speak from report only, and not from particular instances within their own knowledge if receivable at all, is of no weight. The witnesses here do not speak of particular instances within their own knowledge where the right to reclaim goods has been asserted on the ground of such conditional delivery, and been acquiesced in by the purchasers. There is no evidence



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early case, a witness being asked whether there was any general course of business as to the matter in dispute, Chief Justice TINDAL interrupted him, saying: "Is there any general course of business? Let your mind revolve over instances. I am not asking you whether it is just and proper, but whether there is any prevailing course of business. Either you know such a course of business or you do not. If you do not, say so."<sup>1</sup> And it is laid down in a number of cases that a usage must be proved by instances, and not by opinions.<sup>2</sup> It would, perhaps, be more correct to say that while the witness cannot be permitted to state what the custom is, without more, — because such testimony, on the one hand, might be his idea of what it should be, and on the other, might be what some one had told him, and would therefore be hearsay, — yet, if his knowledge has been derived from his own personal experience of the business in which it exists, his evidence will not be incompetent simply because he cannot refer to particular cases to illustrate his statement of what the usage is.<sup>3</sup> As said in the recent case of *Gallup v. Lederer*:<sup>4</sup> "To prove the existence of a custom, something more than the judgment or the conclusion of the witness called to support it is required. A custom is the result of usage, and can only be properly shown by proof of the usage from which it may be claimed to be derived. The inquiry in such cases is not after the opinions of traders and merchants in respect to the law upon a mercantile question, but for the evidence of a fact, to wit: the usage or practice in the course of mercantile business in a particular case." If this fact is clear and fixed in the mind of the witness as a fact, and not as a mere opinion, there is no reason for absolutely insisting on his stating any individual cases. Therefore, in *Hamilton v. Nickerson*<sup>5</sup> it was held that a witness may state his belief of what the custom is, although unable to give any instances of it. A custom for warehousemen, in the absence of the consignee, to pay carriers' charges in certain cases being set up, a witness was called to prove it, who testified that all the absolute knowledge he had on the subject was derived from his own business; that he had been agent of a line of

of fact — no evidence that the purchasers have had frequent and actual experience of the custom; and without this I cannot say the custom exists." *McCoun, V. C.*, in *Mills v. Hallock*, 2 Edw. Ch. 652.

<sup>1</sup> *Hall v. Benson*, 7 Car. & P. 711. And see *Edie v. East India Co.*, 1 W. Black. 295; 2 Burr. 1216. "You may examine witnesses to prove a particular course of trade, or other matters in the nature of facts, but not to show what the law is. Nothing could be more dangerous than to fix the law upon the opinions of particular men." *Ruan v. Gardner*, 1 Wash. C. Ct. 145; *Winthrop v. Union Ins. Co.*, 2 Wash. C. Ct. 7. "Usage is made not by opinions, but by the usual acts and conduct of men in a given class of cases." *Fletcher v. Seckell*, 1 R. I. 267. The value of services requiring the exercise of professional or artistic skill may be proved by usage. Such usage must, however, be established by proving, not what one or

another of the particular profession would charge, but what is the usual or customary rule of compensation. *Pfeil v. Kemper*, 3 Wis. 318.

*Bishop v. Clay Ins. Co.*, 45 Conn. 430; *Robinson v. Chittenden*, 7 Hun, 133; *Shackelford v. New Orleans, etc., R. Co.*, 37 Miss. 202; *Consequa v. Willings*, 1 Pet. C. Ct. 230; *Bryant v. Kelton*, 1 Texas, 434; *Hagerly v. Scott*, 10 Texas, 525; *Chenery v. Goodrich*, 106 Mass. 566; *Mills v. Hallock*, 2 Edw. Ch. 652; *Sigs-worth v. McIntyre*, 18 Ill. 126; *Bissell v. Ryan*, 23 Ill. 566; *Cox v. O'Riley*, 4 Ind. 369; *McClintock v. Lary*, 23 Ark. 215; *Syers v. Bridge*, 1 Doug. 509; *Haskins v. Warren*, 115 Mass. 514; *Cunningham v. Fonblanque*, 6 Car. & P. 44.

<sup>2</sup> *Camden v. Cowley*, 1 W. Black. 417; *Insurance Co. v. Weide*, 11 Wall. 438.

<sup>3</sup> 1 Hun, 282.

<sup>4</sup> 13 Allen, 351.



## Facts, not Opinions.

packets between New York and Boston (in which latter place the custom was alleged to exist) for a long time; that he could state what he believed the general custom to be, from a knowledge of the business and of the custom, but could not state individual cases; and that he knew of it in the way men generally gather knowledge. Another witness, in the same business, was allowed to testify that he believed this to be the custom, and was willing to swear to his belief. In the Supreme Court it was ruled that the testimony had been properly received. "The existence of a custom or usage of trade," said BIGELOW, C. J., "could be proved only by the evidence of those who had such knowledge of the practice and course of business as to create in their minds the belief or conviction of its existence. The *factum probandum* was not a single isolated act or occurrence, but the result or conclusion derived from a series of similar acts or circumstances, creating and establishing in the mind of the witness a conviction or belief of the complex whole or comprehensive fact to the existence of which he was called upon to testify. In such case belief is knowledge, and constitutes direct and primary evidence. Indeed, the existence of a usage could not well be proved by showing particular instances of transacting business in a certain way. The only proper method of establishing the fact was by the testimony of witnesses who had active and constant experience of the manner in which the trade was conducted in relation to the matter in controversy. It was precisely to this point that the testimony of the witness was directed. He stated his belief of the existence of the usage as derived from a knowledge of the business for a long series of years." But the witness must testify to facts, not to inferences deducible from them. Thus, he may testify that such was in fact the custom, but not that, such being the fact, he should consider the custom so and so.<sup>1</sup>

(b.) But the opinions of merchants or other persons engaged in a particular trade or business are admitted by the courts for the purpose of ascertaining the sense in which certain words or mercantile terms are used in contracts.<sup>2</sup> This meaning being ascertained, their opinion as to its legal effect is of course irrelevant.<sup>3</sup> In *Kirkland v. Nisbet*,<sup>4</sup> at a jury trial in Scotland, the question being as to the extent of an order for goods given by the defenders to the pursuers, which depended mainly on the construction of certain correspondence between the parties, a witness was asked what an employer "would be entitled to expect" on receipt of a particular letter in the correspondence. The court refused to allow the question, and the case was appealed to the House of Lords. There *Moncrieff* and *Rolt*, Q. C., for the appellants, argued: "The question was competent. We wanted to prove that six hundred tons of the sugar had been actually sold to us by the respondents, and that this was the meaning of the word 'contracted,' in the letter of the 11th of December, 1850. We produced a witness to prove the mercantile usage, and asked him that question." Lord Chancellor CAMPBELL: "If you had asked the witness about the mercantile usage, that might have been well; but how could you ask him such a question as this: 'What would the employer be entitled to expect from that letter?' That was asking

<sup>1</sup> *The Albatross v. Wayne*, 16 Ohio, 513;

*Dean v. Swoop*, 2 Binn. 72.

<sup>2</sup> *Power v. Horton*, 2 Hodge, 16; *Allen v. Merchants' Bank*, 15 Wend. 482.

<sup>3</sup> *Collyer v. Collins*, 17 Abb. Pr. 467.

Scotch App. Rep. 876. And see

*Huston v. Roots*, 30 Ind. 461.

## Facts, not Opinions.

the witness to explain or construe a written document." *Moncrieff and Rolt*, Q. C.: "What we wanted was merely to explain the technical meaning of the word 'contracted.'" Lord Chancellor CAMPBELL: "But you must defend the question as put. The question was, in substance, 'What is the meaning or just construction of the whole letter?'" Lord CHELMSFORD: "What a witness in such cases is called on to do, is merely to explain some technical terms to assist the court, and the court then construes the document. You might have asked the witness what was the technical meaning of the word 'contracted,' if it had any peculiar meaning. But you ask him the meaning of the whole written contract. You are not to use the witness as an interpreter, but only as a guide." Lord Chancellor CAMPBELL: "You are not to substitute the witness for the judge." *Moncrieff and Rolt*, Q. C.: "We can carry the argument no further." Lord Chancellor CAMPBELL: "My lords, I think that this question was very properly overruled by the learned judge, because, in effect, it sought to obtain the opinion of the witness on the construction of a written document. There is no doubt that evidence may be competently given of mercantile usage to explain the meaning of peculiar terms used in trade. But what is the meaning of a written document is not a question proper to put to a witness. The question here put was substantially this: What was the contract—what is the construction of the document? That was an improper question, and I have no difficulty in recommending your lordships to affirm the unanimous judgment of the learned judges in Scotland which overruled it." Lords BROUGHAM, CRANWORTH, and CHELMSFORD concurred. Therefore, an English dictionary is not admissible to show that a particular word has derived a peculiar meaning from mercantile usage. So, in *Houghton v. Gilbert*,<sup>1</sup> the meaning of the word "cargo" in a policy of insurance being disputed, the defendants' counsel was referring to Entick's Dictionary, when he was interrupted by Chief Justice TINDAL, who said: "It is a question of mercantile construction. You had better lay aside your dictionary, and appeal to the knowledge of the jury; for, after all, the dictionary is not authority." And although, as will be seen further on,<sup>2</sup> extrinsic evidence is admissible to explain doubtful words, or initials, or ciphers in a will, this must be by showing the testator's common habit of speech or writing to so use them, and not what he intended by so using them.<sup>3</sup>

§ 56. *Same—Adjudged Cases.*—The usage of trade may be proved by parol, whether it arises out of a public written law, the edicts or instructions of a foreign government, and whether the trade be allowed or prohibited by such edicts or instructions.<sup>4</sup> The usages of the land-office must be proved by its published decisions.<sup>5</sup> A reported case in which a certain commercial usage was held to be established by testimony is relevant in subsequent cases between other parties, involving a similar usage at the same time and place, or at a time and place not far removed.<sup>6</sup> But it seems that this is not so where the decision

<sup>1</sup> 7 Car. & P. 701.

<sup>2</sup> *Post*, Chap. IV.

<sup>3</sup> *Hunt v. Hort*, 3 Bro. C. C. 311; *Price v. Page*, 4 Ves. 679; *Miller v. Travers*, 8 Bing. 244; *Clayton v. Lord Nugent*, 13 Mee. & W. 200; *Weatherhead v. Sewell*, 9 Humph. 272; *Newburgh v. Newburgh*, 5 Madd. 223; *Chappel v. Avery*, 6 Conn. 34.

<sup>4</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506; *Drake v. Hudson*, 7 Har. & J. 399.

<sup>5</sup> *Hammond v. Warfield*, 2 Har. & J. 151.

<sup>6</sup> *Allen v. Merchants' Bank*, 15 Wend. 482.

## Witnesses—Order of Proof.

proceeded upon the stipulation or concession of the parties that the usage existed.<sup>1</sup> And the decisions of State courts are evidence in the Federal courts of local usages.<sup>2</sup> Where a party relies upon the reputation of a mining district contained in a book, he must put in evidence the whole book, and cannot offer a single extract or clause alone.<sup>3</sup>

§ 57. **Who may be called as Witnesses.**—The witness or witnesses called to give evidence of the existence of a usage may do so from their own knowledge and experience, or from information derived through the course of trade.<sup>4</sup> All that is necessary is that they should have occupied such a position as to know of its existence as a fact. Therefore, a custom that the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction, may be proved by builders or contractors as well as by architects;<sup>5</sup> to prove a custom as to adjusting losses on policies on iron, insurance-brokers as well as iron-merchants are competent;<sup>6</sup> to prove a usage of banks, one who is in the habit of dealing with banks is as capable to explain these usages as a banker or a bank employee.<sup>7</sup>

§ 58. **Order of Proof—Proper Questions.**—When a witness is interrogated as to a custom, the object and pertinency of the proof should be first shown, either by the question itself or independently, in order that the court may understand its relevancy.<sup>8</sup> Either party may give evidence of a custom without accompanying it with direct evidence that it was known to the opposite party, provided he intends, on all the evidence to be produced in the case, to show that knowledge.<sup>9</sup> But strictly, the proper order being to prove the usage first and the notice afterwards, evidence of the usage may well be excluded when the party offering it does not intimate his intention to follow it by proof of knowledge of some kind, either express or presumptive.<sup>10</sup> To ask a witness how a certain kind of business is done, — as, for example, the usual mode of transferring notes and drafts from one bank to another, — is not asking a question of law. It is a mere matter of fact, and the legal effect of doing the business in the manner described by him is another and a different question.<sup>11</sup> Where a witness was asked, "Do you know of *any* usage or custom in the life-insurance business as to the commutation of renewals?" it was said on appeal that the proper form would have been, "What is the general or universal usage and custom in the life-insurance business as to the commutation of renewals?"<sup>12</sup> A custom cannot be proved by a witness stating that it is the "custom of the country," nothing being shown as to its extent or the length of time it has existed.<sup>13</sup>

<sup>1</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

<sup>2</sup> *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Providence Ins. Co.*, 16 Pet. 511; *Meade v. Beale*, Taney's Dec. 329.

*English v. Johnson*, 17 Cal. 107.

<sup>4</sup> *Allen v. Merchants' Bank*, 15 Wend. 482.

<sup>5</sup> *Wilson v. Bauman*, 80 Ill. 493.

<sup>6</sup> *Evans v. Commercial Ins. Co.*, 6 R. I. 47.

<sup>7</sup> *Griffin v. Rice*, 1 Hill. 184.

<sup>8</sup> *Ecker v. Moore*, 2 Chand. 85.

<sup>9</sup> *Dodge v. Favor*, 15 Gray, 82.

<sup>10</sup> *Flynn v. Murphy*, 2 E. D. Smith, 378.

<sup>11</sup> *Commercial Bank v. Union Bank*, 19 Barb. 392.

<sup>12</sup> *Park v. Piedmont, etc., Ins. Co.*, 48 Ga. 601.

<sup>13</sup> *Kendall v. Russell*, 5 Dana, 501.

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 Quantum of Evidence — Law and Fact.
 

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§ 59. **Quantum of Evidence.** — It is not necessary, in order to prove a valid custom, that all the witnesses on both sides of the case should agree concerning it. They may differ as to its existence in the same place or in all places, and in such case the question is one for the jury. But if one set of witnesses prove that they knew of and followed a certain custom in some localities and as to some contracts, and another set show that there was no such custom in other localities and as to other contracts, and none of them state that this custom is notorious, the evidence simply shows a custom local and partial, and is insufficient.<sup>1</sup> If plaintiff and defendant introduce evidence of different usages, the refusal of the court to rule that if the evidence is conflicting the defendant cannot maintain his defence on the ground of usage, gives the plaintiff no ground of exception, if the defendant relies upon his evidence of usage or the negative the usage set up by the plaintiff.<sup>2</sup> In a Missouri case, *WAGNER, J.*, commented on the evidence offered to prove a usage, as follows: "A large mass of evidence was introduced to show a custom among the merchants that the effect of the order was to vest the title of the flour in the purchasers, and that from the time the card was handed over to them they became the absolute owners, and that the transference of the same to the plaintiff divested the defendant of all interest. But this branch of the case was not made out. There was great diversity among the witnesses as to the force and meaning of the supposed custom, and so far from tending to establish any open, uniform, and notorious rule, the most of the witnesses restricted themselves to declaring what their individual opinions were, and the obligations they should have deemed resting upon them had they been placed in the defendant's situation. This, of course, was all illegal, and should have been excluded."<sup>3</sup>

Newly discovered evidence of a custom in violation of the public laws of the State is no ground for a new trial.<sup>4</sup>

§ 60. **Law and Fact.** — Proof of a usage or custom involves questions of both law and fact. It is a question of law what is a sufficient usage to bind the parties: for how long a time, at what places, and with what degree of uniformity it must have been observed; whether, in short, a given state of facts establishes a usage, is a question for the court.<sup>5</sup> Whether such a state of facts has been proved is a question for the jury,<sup>6</sup> and also whether the parties acted with reference to the usage.<sup>7</sup> On the other hand, the reasonableness of an alleged custom is a question of law for the court,<sup>8</sup> and it is error to submit it to the jury.<sup>9</sup> An erroneous ruling excluding, as immaterial, evidence of a custom is cured by a charge to the jury recognizing a general custom of the character sought to be proved.<sup>10</sup> Where evidence of usage is given to control the con-

<sup>1</sup> *Dickinson v. City of Poughkeepsie*, 75 N. Y. 66.

<sup>2</sup> *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446.

<sup>3</sup> *South-Western Freight & Cotton-Press Co. v. Stanard*, 44 Mo. 71.

<sup>4</sup> *Lynes v. The State*, 46 Ga. 308.

<sup>5</sup> *Chicago Packing Co. v. Tilton*, 87 Ill. 518.

But see *Wilson v. Bauman*, 80 Ill. 493.

<sup>6</sup> *Mears v. Waples*, 4 Houst. 62; *Bryce v. The Empress*, 3 West. L. J. 171.

<sup>7</sup> *Powell v. Bradlee*, 9 Gill & J. 220; *Burroughs v. Langley*, 10 Md. 248.

<sup>8</sup> *Bourke v. Kneeland*, 4 Mich. 336; *Mussey v. Eagle Bank*, 9 Mete. 306; *Smith v. Tyson*, 1 Per. & Dav. 307.

<sup>9</sup> *Codman v. Armstrong*, 28 Me. 91; *Randall v. Smith*, 63 Me. 105. See *Bodfish v. Fox*, 23 Me. 90.

<sup>10</sup> *Clark v. Cox*, 32 Mich. 204.

## Evidence of Different Customs.

struction of a written instrument, the jury are to determine its effect.<sup>1</sup> But the question in many cases is one of extreme difficulty; whether a particular custom has been tacitly included in or excluded from a written contract, is a question purely legal. "We take it," said the court, in *Lewis v. Marshall*,<sup>2</sup> "that the acknowledged distinction is this: if the evidence offered at the trial by either party is evidence by law admissible for the determination of the question before a jury, the judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence when offered. Whether that evidence is of that character and description which makes it admissible, is a question for the determination of the judge alone, and is left solely to his decision." And when the jury have decided on the meaning of the terms by the assistance of the usage, it is still for the court to construe the entire contract or document.<sup>3</sup>

§ 61. **Evidence of Customs at different Places or in other Trades.** — An important question here arises as to whether evidence of a custom at a different place is admissible as bearing on the question of a custom at the *locus in quo*. It was an ancient and well-established rule that the custom of one manor could not be given as evidence to prove the custom of another, because, each manor having customs peculiar to itself, such evidence would be both unsafe and useless.<sup>4</sup> But in an early English case it was distinctly laid down, that to prove the manner of conducting a particular branch of trade at one place, evidence may be given to show the manner in which the same branch is carried on at another place. This principle was announced in a case decided in the King's Bench in 1780, where, on a policy of insurance on a vessel from England to Labrador, the goods having been seized by a privateer, the question arose whether there had been any unnecessary delay in landing them at Labrador. The plaintiffs, in order to show that there had been no such delay, called witnesses, who proved that according to the custom in Newfoundland, goods were kept on board the vessels several months in some cases. Lord MANSFIELD having admitted the evidence, the case went to the full bench, where his ruling was sustained. "The defendant says," said Lord MANSFIELD, "the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. \* \* \* It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. I still think the evidence on that subject was properly admitted to show the nature of the trade. The point is not analogous to a question concerning a common-law custom."

<sup>1</sup> *Dawson v. Kittle*, 4 Hill, 107; *Goodyear v. Ogden*, 4 Hill, 104.

<sup>2</sup> 7 Man. & G. 729. And see *Parker v. Ibbetson*, 4 C. B. (N. s.) 346.

<sup>3</sup> *Hutchison v. Bowker*, 5 Mee. & W. 535; *Nelson v. Harford*, 8 Mee. & W. 800.

<sup>4</sup> Dane's Abr., chap. 26, § 10; *Anglesey v. Hatherton*, 10 Mee. & W. 218. Under a custom for all the inhabitants of a parish, a person who rents a tenement within the parish which he uses occasionally, but in which he does not actually reside, is included. *Fitch*

*v. Fitch*, 2 Esp. 543. But evidence of a custom to perambulate the boundaries of a parish is not sufficient to support an allegation to perambulate the boundaries of a liberty. *Grant v. Kearney*, 12 Price, 773. Where a custom is proved to exist, it will extend to all tenancies, in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves. *Wilkins v. Wood*, 12 Jur. 583; 17 L. J. (Q. B.) 319; *Evans v. Ogilvie*, 2 You. & J. 79.

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BULLER, J., added: "If it can be shown that the time would have been reasonable in one place, that is a degree of evidence to prove that it was so in another. The effect of such evidence may be taken off by proof of a difference of circumstances. It is very true that the custom of one manor is no evidence of the custom of another. That has been determined in many cases. But the point here is very different; it is a question concerning a particular branch of trade."<sup>1</sup> In *Plaice v. Allcock*,<sup>2</sup> the defendants, who were bleachers at Nottingham, claimed a lien on certain of the plaintiff's hose which had been sent to them to be bleached, under an alleged usage in Nottingham. In order to support their demand the defendants proved, by the evidence of bleachers and hosiers carrying on business there, that it was the custom of bleachers in Nottingham to retain all goods sent to be bleached until they were paid all previous accounts. In addition to this, bleachers carrying on business at Loughborough were called to support the usage. *Macaulay*, for the defendants, objected that the course of business at Loughborough had no tendency to prove a custom of trade at Nottingham. *Field*, for the plaintiffs, proved that Loughborough was only four miles distant from Nottingham; that Loughborough hosiers were in the habit of sending their goods to be bleached at Nottingham, and that Nottingham hosiers also sent their goods to be bleached at Loughborough; and he contended that, by reason of the vicinity of the places and the interchange of trade, the evidence was admissible. WILLES, J., admitted it. And in the recent case of *Fleet v. Murton*,<sup>3</sup> the custom of a different market was admitted. The court, although it had some doubt, seeing that the case went further than *Noble v. Kennoway*, decided that it was admissible, on the general principle that it would be useful in elucidating the truth, and because, in the words of BLACKBURN, J., "it struck me, where the question was, Does a broker in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence? that it would be proper evidence for a jury to consider and weigh that such a custom existed in other trades, and that in those other trades the brokers did incur a personal liability." So, in *Falkner v. Earle*<sup>4</sup> it appeared that there was a custom at Liverpool of allowing a discount of three months on freight payable on all bills of lading from ports in North America, and that when Texas was annexed to the United States, in 1846, the custom was extended to ports in that territory, and it was held that this was evidence from which a jury might infer that the custom extended to ports in California, after that country had been annexed to the United States.

The American courts have been less liberal in admitting this sort of evidence, being apparently more afraid of encroaching upon some technical rule than desirous of elucidating the whole truth. It was announced by FLANDRAU, J., in a Minnesota case, that "it is only in some exceptional cases that proof of a usage in one place is allowed to show that it existed in another,"<sup>5</sup> but without saying what those cases were. So, in Delaware, it was said by GILPIN, J.:

<sup>1</sup> *Noble v. Kennoway*, 1 Doug. 510. See also *Milward v. Hibbert*, 3 Q. B. 120, where it was held that a plea of a custom of trade in London might be supported by proof of a custom prevailing in London and other English ports.

<sup>2</sup> 4 Post. & Fin. 1074.

<sup>3</sup> *Ante*, p. 90.

<sup>4</sup> 3 Best & S. 360.

<sup>5</sup> *Walker v. Barron*, 6 Minn. 508.



## Illustrations.

"It does not follow that because a custom or usage is recognized as obligatory in Philadelphia or New York, that it is recognized as such in Baltimore or New Orleans, or has any force or effect in these latter cities. The custom or usage in one State may not be the same in another. The States of the Union, in regard to commercial purposes, stand in the relation of foreign States toward each other, so that a custom or usage in one State is not necessarily binding or obligatory upon persons engaged in the same trade in another State."<sup>1</sup> In Maryland it is held that an insurance policy on a vessel being built in Baltimore is not affected by a usage existing in New York;<sup>2</sup> in Illinois, that a custom of bankers as to checks in New York cannot affect the general law in other places;<sup>3</sup> in Massachusetts, that a usage of underwriters in Boston to expressly except barratry of the master from risks, whenever the assured is the owner of the vessel insured, cannot import this exception by implication into a policy written in Gloucester;<sup>4</sup> and in *Camden v. Doremus*,<sup>5</sup> that evidence of a general custom of banks to give notice to the payor of the time notes fall due is admissible upon the practice of the particular bank at which the note in question is payable.

On the other hand, it is held in an Alabama case<sup>6</sup> that proof of a general custom among mechanics and artisans in a city, whereby journeymen and employees are required to work for their employers only a certain number of hours a day, and are allowed the privilege of working for themselves at other times, is competent evidence to be submitted to the jury as tending to show the existence of such a custom among daguerrotypists, ambrotypists, and photograph painters, whose occupations also belong to the mechanical arts.

But, where the custom in one place is proved, evidence that it is different in another is inadmissible;<sup>7</sup> and therefore it was held in Michigan that proof of a usage at an insurance agency at one place in the State was not relevant on the question of the practice of an agent at another place, he having testified that his practice was different.<sup>8</sup>

§ 62. Customs must be construed strictly.—One of the principal rules governing common-law customs was that all customs in derogation of the common law were to be strictly construed.<sup>9</sup> Mr. BROWNE says: "There is always a presumption against a thing while it is only in the making, and a presumption in favor of the thing which is made. There is a deep truth in Milton's remark, that error is only truth in the making, and consequently it is well to pronounce against a custom which is the making of law, in favor of a law which is recognized, acknowledged, and made. Now, this doctrine of strict construction is a deference to this presumption. Thus it comes that although by the custom of gavelkind an infant of fifteen years may, by a deed of feoffment, convey away his lands in fee-simple, this custom would not be held to

<sup>1</sup> Gilpin, C. J., in *Mears v. Waples*, 3 Houst. 581.

<sup>2</sup> *Mason v. Franklin Ins. Co.*, 12 Gill & J. 468.

<sup>3</sup> *Strong v. King*, 35 Ill. 9.

<sup>4</sup> *Parkhurst v. Gloucester, etc., Ins. Co.*, 100 Mass. 301.

<sup>5</sup> 3 How. 515.

<sup>6</sup> *Barnes v. Ingalls*, 39 Ala. 193.

<sup>7</sup> *Allen v. Lyles*, 35 Miss. 513.

<sup>8</sup> *Reynolds v. Continental Ins. Co.*, 36 Mich. 131. And see *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. 340.

<sup>9</sup> *Richardson v. Walker*, 2 Barn. & Cross. 839.



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entitle him to effect the same thing by any other conveyance. Such a rule is contrary to the common law; and although its having become a rule is an indication that it must have had a reason; the fact that the rule of the common law is different proves that there was a reason for the diverse custom which is thus shown. The rational way of dealing with such a case is to give effect, as far as possible, to the latent reason which is in both; and hence the rule of construction to which we have alluded. Thus, where there is a custom that lands shall descend to the eldest sister, the courts will not extend the authority of this custom to include an eldest niece.<sup>1</sup> Where, however, there is a custom in a manor that a man may convey his copyhold in fee-simple, that will not be held to preclude him from conveying it for life, for in such a case the lesser right must be held to be included in the greater; and it was, therefore, here said that although customs must be strictly, they need not necessarily be literally construed."<sup>2</sup> And so it is said, in *Archer v. Bokenham*,<sup>3</sup> that customs are to be construed "strictly, — nay, very strictly, — even stricter than any act of Parliament that alters the common law."

So of usages of trade — nothing will be presumed to be within them which they are not proved to cover. A custom of delivering goods to a mate of a ship will not excuse a delivery to a deck-hand, or leaving them near the ship in charge of no one;<sup>4</sup> a custom for passengers on a boat to place their baggage thereon without notice to the officers will not protect one who does not accompany a trunk which he leaves in this way, and who is, therefore, not a "passenger;"<sup>5</sup> a carrier's usage being to give notice of the arrival of goods at the consignee's store, he is not obliged to seek him elsewhere;<sup>6</sup> a usage of a bank teller to issue certificates of deposit does not tend in any way to prove a usage for him to certify checks;<sup>7</sup> a usage showing when a voyage is at an end, so far as the payment of premium-notes is concerned, cannot be introduced to show when a voyage terminates as regards the payment of losses;<sup>8</sup> a usage of a captain of a boat to sign bills of lading for articles deliverable at one port is no proof of authority to sign bills of lading for a different port;<sup>9</sup> a custom giving to brokers a certain commission will not help a middle-man,<sup>10</sup> or one who is not strictly a broker;<sup>11</sup> a custom of hardware merchants will not be extended to help commission merchants;<sup>12</sup> and a usage as to the term of employment of traveling salesmen cannot affect a party employed on a share of the profits of his sales.<sup>13</sup> Where a policy of insurance prohibits the insured from keeping on the premises certain specified dangerous articles, the custom of the insured to keep such articles on the premises is immaterial, unless at the time of the fire they were actually there.<sup>14</sup>

<sup>1</sup> *Denn v. Spray*, 1 Term Rep. 466; *Muggleton v. Barnett*, 2 Hurl. & N. 663.

<sup>2</sup> 1 Coleridge's Bla. 79.

<sup>3</sup> 11 Modern, 160.

<sup>4</sup> *Leigh v. Smith*, 1 Car. & P. 438; *Packard v. Gotman*, 6 Cow. 757.

<sup>5</sup> *Wright v. Caldwell*, 3 Mich. 51.

<sup>6</sup> *Ely v. New Haven Steamboat Co.*, 53 Barb. 207.

<sup>7</sup> *Mussey v. Eagle Bank*, 9 Metc. 206.

<sup>8</sup> *Meigs v. Mutual Marine Ins. Co.*, 2 Cush. 439.

<sup>9</sup> *Nichols v. De Wolf*, 1 P. I. 277.

<sup>10</sup> *Hupp v. Sampson*, 16 Gray, 398.

<sup>11</sup> *Canby v. Frick*, 8 Md. 163; *Main v. Eagle*, 1 E. D. Smith, 619.

<sup>12</sup> *Field v. Banker*, 9 Bosw. 467.

<sup>13</sup> *Dike v. Pool*, 15 Minn. 315.

<sup>14</sup> *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219.

## Illustrations.

A usage cannot act retrospectively.<sup>1</sup> A usage or custom which is disregarded in a court of law cannot be regarded as a rule of action in a court of equity.<sup>2</sup>

In a South Carolina case it was held that the custom of a railroad to allow its contractors to pass up and down on their cars, with their tools, materials, etc., free of cost, could not be extended so as to bind the company to pay the expenses of its contractors on a road belonging to another and different company. "There is a wide difference," said RICHARDSON, J., "between a railroad allowing their contractors, as it may be convenient, to pass up and down in their regular trains of cars, when there is room to spare, and the paying for their passage on other railroads. The former is an accommodation, without positive loss. The latter would be an assumption to pay the debt of another, which requires a valuable consideration. It would be very like a friend who, being in the habit of using your horse *gratis*, should undertake to hire a horse and charge the hire to you."<sup>3</sup> But in New York, where it is the custom at a port, upon the sale of grain being made, that the purchaser selects a measurer, and the measurer so selected is appointed by the board of measurers to perform the duty, it is decided that where the measurement is in fact made by a measurer appointed by the board, the custom is sufficiently complied with, and it is immaterial whether the measurer is selected by the seller or purchaser.<sup>4</sup> A custom of the ale trade to credit the vendee with ale which, on delivery, was found unfit for use, it was held, would not apply to ale shipped from Chicago to Montana. "It is most unreasonable," said the court, "to make any application of this usage to ale shipped to this distant Territory, exposed to delays, and subject to every variety of carriage."<sup>5</sup> Evidence of a custom of boats to carry bank-bills for customers in order to obtain their patronage, is insufficient to establish a custom of carrying bank-bills for hire.<sup>6</sup>

In a recent Iowa case,<sup>7</sup> an employee of a railroad company sued the latter for damages for injuries received while operating its road. The circumstances were these: The plaintiff was riding on a construction-train, consisting of several flat-cars and a caboose, the latter being the rear car. The train was near a station, where it was to remain until the next day. The caboose was to be put upon a side-track upon one side of the main track, and the rest of the train upon a side-track upon the other side. The caboose was cut off while the train was in motion, with the design of stopping it upon the main track, and afterwards placing it upon the side-track. The train was in charge of one O., who detached the caboose, the movement of the train having been slackened for that purpose. O. stood at the door of the caboose. Having detached it, he signalled to the engineer to increase speed, which resulted not only in taking up the slack, but in a slight jerk. The plaintiff was standing upon the flat-car from which the caboose had been detached, near the rear end of the car. The jerk caused him to lose his equilibrium, and in stepping rearward to regain it, he fell off and was run over by the caboose, which was following not far behind.

<sup>1</sup> United States v. Buchanan, Crabbe, 563.

<sup>2</sup> Morrison v. Hart, 2 Bibb, 4.

<sup>3</sup> Colcock v. Louisville, etc., R. Co., 1 Strobb, 329.

<sup>4</sup> McCready v. Wright, 5 Duer, 571.

<sup>5</sup> Legg v. The Ale Brewing Co., 60 Ill. 158.

<sup>6</sup> Chouteau v. The Anthony, 16 Mo. 216; 20 Mo. 510.

<sup>7</sup> Jeffrey v. Keokuk, etc., R. Co. (Sup. Ct. Iowa, June, 1879).

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One of his legs was crushed, and amputation was made necessary. He alleged that O. was negligent in causing the sudden forward movement of the train without giving warning. On the trial, the plaintiff was permitted to give evidence of a custom or rule of the company prohibiting "running-switches." But, as what had been done was not strictly making a "running-switch," the Supreme Court held that the evidence was incompetent and should have been excluded. "The rule," said ADAMS, J., "certainly was inadmissible unless there was evidence tending to show that it was violated, and that the accident occurred by reason of the acts by which it was violated. The only object of introducing the rule must be, to make that negligence which but for the rule and the violation of it would not be negligence. Where an act is such as to constitute negligence of itself, independent of any express rule and its violation, there can be nothing gained by proof of the rule and its violation. Whether an act which, of itself, falls short of constituting negligence can be held to be negligence by reason merely of its being a violation of an express rule of the company, we need not determine. It is sufficient to say that the evidence, we think, does not show, or tend to show, a violation of the rule in question. The rule prohibits 'running-switches.' But what was done was not done in making a 'running-switch,' nor with the view of making one. The caboose was, to be sure, to be placed upon the side-track, but it was to be stopped upon the main track, and drawn upon a side-track by an engine, which, according to the evidence, is precisely not a 'running-switch.' A 'running-switch' would have been effected by cutting off the caboose while the train was in motion, and causing it, while detached from the engine, to pass upon the side-track, the locomotion resulting from the momentum acquired by the caboose while in the train. This is undisputed. But it is said that what was done is the same thing as what is done as a preliminary step to making a 'running-switch' — that is, the caboose was cut off while the train was in motion, and was allowed to follow. But the evidence tends to show that the danger which makes a 'running-switch' especially objectionable occurs when the actual switching takes place. If the plaintiff relies upon something as constituting negligence which would fall short of negligence but for an express rule of the company and its violation, he must show an actual violation."

§ 63. **Conflict of Laws.** — Where a contract is drawn at a place where both parties reside, such ambiguities as it may contain are to be construed by the usage of that place.<sup>1</sup> "The general rule then is," says STORY, "that in the interpretation of contract, the law and custom of the place of the contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature and objects and occasion of the contract."<sup>2</sup> \* \* \* By the law of England, a month means ordinarily in common contracts, as in leases, a lunar month, but in mercantile contracts it means a calendar month.<sup>3</sup> A contract, therefore, made in England for lease of land for twelve months would mean a lease for forty-eight

<sup>1</sup> Whart on Confl., § 434; Story on Confl., § 263 (citing *Watson v. Brewster*, 1 Barr, 381; *Allshouse v. Ramsay*, 6 Whart. 331; *Benness v. Clemens*, 58 Pa. St. 24; *Baltimore, etc., R. Co. v. Glenn*, 28 Md. 287).

<sup>2</sup> Story on Confl., § 272.

<sup>3</sup> *Catesby's Case*, 6 Coke, 62; *Lacon v. Hooper*, 6 Term Rep. 224.

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weeks only. A promissory note to pay money in twelve months would mean in one year, or in twelve calendar months.<sup>1</sup> If a contract of either sort were required to be enforced in a foreign country, its true interpretation must be everywhere the same—that is, according to the usage in the country where the contract was made. The same word, too, often has different significations in different countries. Thus, the term ‘usance,’ which is common enough in negotiable instruments, means in some countries a month, in others two or more months, and in others half a month. A note payable at one usance must be construed everywhere according to the meaning of the word in the country where the contract is made. There are many other cases illustrative of the same principle. A note made in England for £100 would mean £100 sterling. A like note made in America would mean £100 in American currency, which is one-fourth less in value. It would be monstrous to contend that on the English note sued in America the less sum only ought to be recovered, and, on the other hand, on the American note sued in England, that one-third more ought to be recovered.”<sup>2</sup> When, however, one of the parties is a foreigner, the question arises whether he knew of the local usage, and intended to accept it as part of his contract.<sup>3</sup> But if a contract to be performed in England was executed by two Englishmen travelling in America, the law of the place of performance, and not that of the place of contract, would govern.<sup>4</sup> Where a contract is entered into by correspondence, then the usage of the place of the writer who first employs the controverted terms must be followed to explain them, although this was not the place where the contract was closed, because the party who first introduces these terms is supposed to do so in the sense with which he is familiar.<sup>5</sup> But where there is a place of performance whose language and usages the parties meant to adopt, then such language and usages must prevail. Thus, when money is to be paid, or goods delivered, or lands conveyed in a foreign country, then the currency, weights, and measurements of such foreign country are to be the standards: first, because such is presumed to be the intention of the parties; and, second, because generally there will be no other currency, weights, or measurement in such country by which the contract could be performed.<sup>6</sup> So, where a contract was entered into in London for the loading of a cargo at Trinidad, it was held that it was to be construed by the usages of the port of Trinidad.<sup>7</sup>

In *Star Glass Company v. Morey*,<sup>8</sup> a contract made in Boston with a manufacturer of window-glass in Philadelphia for the purchase from him of glass there manufactured, or to be manufactured, and its delivery there to a carrier, referred for the designation of sizes of the glass and as to the basis of prices to cards issued by the manufacturer, without special reference to the Boston market. It was held that if there was a difference in the local usages of the two places as to the standard of measurement or the mode of cutting the glass so as to fit

<sup>1</sup> *Lang v. Gale*, 1 Mau. & Sel. 111; *Cockell v. Gray*, 3 Brod. & B. 187; *Leidingwell v. White*, 1 Johns. Cas. 99.

<sup>2</sup> *Story on Conf.*, §§ 270, 271.

<sup>3</sup> *Whart. on Conf.*, § 434.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.*, § 435.

<sup>6</sup> *Whart on Conf.*, § 437 (citing *Rosetter v. Cahllman*, 8 Exch. 261; *Stapleton v. Conway*, 3 Atk. 727; *De Wolf v. Johnson*, 10 Wheat. 323; *Clayton v. Gregson*, 5 Ad. & E. 302).

<sup>7</sup> *Cuthbert v. Cumming*, 11 Exch. 405. And see *Greaves v. Legg*, 11 Exch. 644.

<sup>8</sup> 108 Mass. 570.

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the corresponding sizes of sash, and no provision was made as to this in the contract, the usage at Philadelphia would govern.

Where a vendee of land demands a deed with customary covenants, what is customary is determined by the *lex rei sitæ*.<sup>1</sup>

§ 64. **Pleading.**—A general usage or custom need not be pleaded, but may be given in evidence at the trial, or judicially noticed by the court for the first time on appeal.<sup>2</sup> But the custom of a particular place<sup>3</sup> and local commercial usages must be pleaded; and so of a custom to excuse the non-performance of a duty prescribed by law.<sup>4</sup> Where a local usage is set up, all the requisites of a valid usage should be averred;<sup>5</sup> but, as one who deals with brokers is presumed to deal with reference to their usages, in a complaint by a broker against his principal it is not necessary to allege that the latter knew of the existence of a custom on which the action is founded;<sup>6</sup> and in a suit on a writing, where certain incidents are attached by usage, the usage need not be specially pleaded.<sup>7</sup> Where a complaint alleges title in the plaintiff, it may be supported by evidence of mining customs, even though they are not mentioned in the pleadings. A usage is not sufficiently pleaded by a single averment that it has been constantly and uniformly recognized and abided by in a certain city in similar cases.<sup>8</sup> In an action for goods sold and delivered, evidence of a usage of trade which gives the purchaser a right to revoke the contract when the article, which appears to be good, is sold as good, but turns out to be rotten and nearly worthless, is not admissible under an answer which does not allege that the sale has been revoked.<sup>10</sup> In New York, evidence of usage is admissible under the general denial.<sup>11</sup>

<sup>1</sup> Gault v. Van Zile, 37 Mich. 22.

<sup>2</sup> Coyle v. Gozzler, 2 Cranch C. Ct. 625; Goldsmith v. Sawyer, 46 Cal. 209; Templeman v. Biddle, 1 Harr. (Del.) 522; Stultz v. Dickey, 5 Binn. 285; Carson v. Blazer, 2 Binn. 476. As to pleading customs in England, see Hawkins v. Wallis, 2 Willes, 173; Tewkesbury v. Bricknell, 1 Taun. 142; Morewood v. Wood, 4 Term Rep. 157; Griffin v. Blandford, Cowp. 62; Peter v. Kendall, 6 Barn. & Cress. 703; Paddock v. Forrester, 3 Man. & G. 903; 3 Scott N. R. 715.

<sup>3</sup> Governor v. Withers, 5 Gratt. 24; Jackson v. Henderson, 3 Leigh, 196.

<sup>4</sup> Governor v. Withers, 5 Gratt. 24.

<sup>5</sup> Wallace v. Morgan, 23 Ind. 399; Dutch, etc., Co. v. Mooney, 12 Cal. 534.

<sup>6</sup> Whitehouse v. Moore, 13 Abb. Pr. 142.

<sup>7</sup> Lowe v. Lehman, 15 Ohio St. 179.

<sup>8</sup> Colman v. Clements, 23 Cal. 245.

<sup>9</sup> Automarchi v. Russell, 63 Ala. 356.

<sup>10</sup> Hight v. Bacon, 126 Mass. 10.

<sup>11</sup> Miller v. Insurance Co., 1 Abb. N. C. 470.

## CHAPTER III.

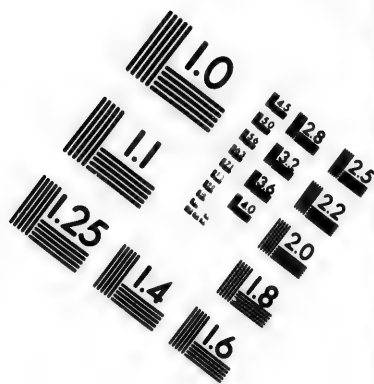
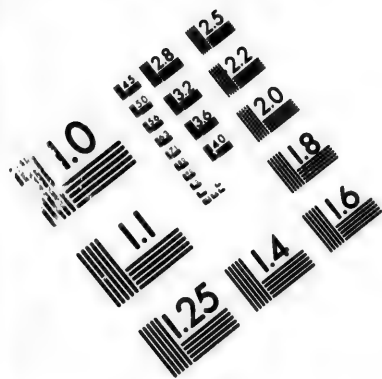
### ON THEIR VALIDITY AND EFFECT IN DIFFERENT RELATIONS AND OCCUPATIONS.

#### ILLUSTRATIVE CASES: —

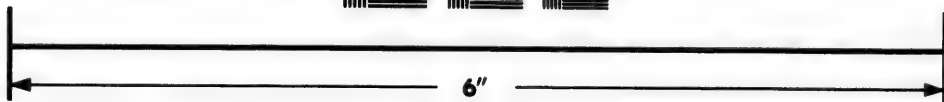
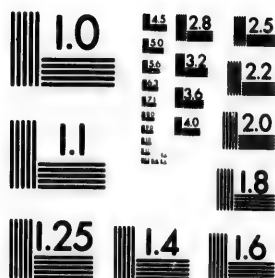
10. *Renner v. Bank of Columbia*. — Banks and banking, and negotiable and assignable paper — Usages as to demand and notice.
11. *Gordon v. Little*. — Common carriers — Usages regarding their general liability, and the meaning of terms in bills of lading.
12. *Farmers and Mechanics' Bank v. Champlain Transportation Company*. — Same — Usages excusing notice of arrival of goods.
13. *Bulkley v. Derby Fishing Company*. — Corporations — Usages contrary to charter powers.
14. *Harper v. City Insurance Company*. — Fire insurance — Customary use of prohibited articles.
15. *Walsh v. Homer*. — Marine insurance — Usage may excuse a deviation.
16. *Wigglesworth v. Dallison*. — Landlord and tenant — Custom as to waygoing crop.
17. *Holcroft v. Barber*. — Master and servant — Usage as regulating term of service.
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19. *Goodenow v. Tyler*. — Principal and agent — Usage governs agents' powers.
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10. BANKS AND BANKING, AND NEGOTIABLE AND ASSIGNABLE  
PAPER—USAGES AS TO DEMAND AND NOTICE

RENNER v. BANK OF COLUMBIA.\*

*In the Supreme Court of the United States, February Term, 1824.*

HON. JOHN MARSHALL, *Chief Justice.*

" BUSHROD WASHINGTON,	} <i>Associate Justices.</i>
" WILLIAM JOHNSON,	
" THOMAS TODD,	
" GABRIEL DUVAL,	
" JOSEPH STORY,	
" SMITH THOMPSON,	

A custom on the part of all the banks of a particular place to demand payment and give notice to indorsers of negotiable paper on the *fourth* day of grace is binding on an indorser, if known to him.

\* Reported 9 Wheat. 532.

## Illustrative Cases.

This cause was argued by *Webster* and *Jones* for the plaintiff in error, and *Key* for the defendants in error.

THOMPSON, J., delivered the opinion of the court.

This case comes up on a writ of error to the Circuit Court of the District of Columbia; and by the record it appears that the action in the court below was prosecuted against Renner, the plaintiff in error, as indorser of a promissory note drawn by James Foyles and discounted at the Bank of Columbia. The note bears date on the ninth day of January, 1817, for \$4,600, and is payable sixty days after date. In the declaration it is averred that demand of payment of the maker was made on the fourteenth day of March, which was on the fourth day after the expiration of the sixty days which the note had to run.

Several questions arising out of the record have been presented for the consideration of the court. The principal one, however, is that which relates to the time of demand of payment of the maker of the note, and grows out of a bill of exceptions taken upon the trial. This has been pressed upon the court as a question of great importance, and the decision of which, in its application to the concerns of the bank, will have a very wide and extensive effect.

We shall proceed to the consideration of this point in the first place, leaving the others, which are of minor importance, to be noticed hereafter.

The testimony given at the trial was for the purpose of showing that the Bank of Columbia had from its first establishment, in 1793, adopted the practice of demanding the payment of notes discounted by it, on the fourth day after the time limited for the payment thereof, according to the express terms of the note, and that such was the universal custom of all the banks in Washington and Georgetown: that this custom was well known and understood by the defendant when he indorsed the note in question. After this testimony had been received, without objection, the counsel for the defendant below called upon the court to instruct the jury that, upon the evidence so given by the plaintiffs of a demand upon the maker of the note on the fourth day after the time limited by the note for the payment, the defendant was not liable on his indorsement: which instruction the court refused to give, and a bill of exceptions was thereupon taken.

This court must, therefore, assume as established facts (and, looking at the evidence before the jury, no doubt could be entertained on the subject) that the custom of the Bank of Columbia, and all the other banks in Washington and Georgetown, from their first institution, had been to demand payment of notes due them, on the fourth day after

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the time limited therein, and that this custom was known and well understood by the defendant, Renner, when he indorsed the note in question; and, it may be added, with full knowledge and expectation that this note was to be dealt with in the same way, for it was a renewal of a discount, continued for a considerable time before, on other notes similarly drawn and indorsed, some of which had been demanded in like manner and protested, and afterwards paid and taken up by himself. Under such circumstances, it would seem that nothing short of some positive and unbending principle of law could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established by well-settled rules of law.

It seems to be assumed as the settled law of promissory notes, that in order to charge an indorser, demand of the maker must be made on the third day after that limited in the note, and that this is so stubborn a rule that parties are not permitted to violate it even by their mutual agreement.

We admit in the most unqualified manner that the usage of making the demand on the third day of grace has become so general that courts of justice will notice it *ex officio*, and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note when they put their names upon it. But that this rule has any attributes so inviolable as not to be touched by the parties to negotiable paper, cannot be admitted. It has its origin in custom, and that custom too comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, and which contributed to make up the common-law code, which is so justly venerated. So far from this, that the allowance of any days of grace is in derogation of the common-law rule applicable to other contracts. They are emphatically the mere creatures of usage, varying in different countries to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. The common law would require payment on the last day limited by the contract, and would also give to the maker the whole of that day. It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement to perform his engagement, and even until the last hour of the day. The common law knows of no fractions of a day; custom, however,—and that introduced, too, principally by banks,—has limited the day to a few hours of business. But this, and whatever other rules have been adopted by consent and merely for the convenience of commercial men, are departures from the common-law doctrine. When, therefore, the allowance of only three days of grace is

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said to be the law of the contract by bills of exchange and promissory notes, nothing more can be intended than that custom has so long sanctioned this rule that all dealers in paper of this description are understood to govern themselves by it. The law of the contract, properly speaking, is to pay when due; and that time is to be ascertained either from the contract *per se*, or that taken in connection with some known custom, which the parties are presumed to have tacitly consented should be made a part of the contract. And it is in this view only that three days of grace are allowed where that custom is recognized as the rule; for a note which upon its face has sixty days to run is in truth and in fact a contract for sixty-three days, and interest is taken for that time. And how is it ascertained that it is a note for sixty-three days but by looking out of the contract and finding what was the understanding of the parties? Where the custom has existed for a long time, and has become general, courts of justice, as before observed, will notice it *ex officio*; and where it has not, it is matter of proof. If this is not the light in which these transactions are to be considered, all banks are chargeable with usury; for all take interest beyond what is allowed by law, if time is to be determined by the note itself. The general rule of law is that demand of payment must be made of the maker when the note falls due, and that time, as now settled, is on the last day of grace; and even this rule is of recent date, for in the King's Bench in England, as late as the year 1791, about coeval with the institution of this bank and the custom established by it, we find Lord KENYON<sup>1</sup> and Mr. Justice BULLER differing on this very point, the former holding that, by analogy to other contracts, the acceptor of a bill of exchange had the whole of the third day of grace to pay the bill, and that a demand on the fourth day was not too late. Mr. Justice BULLER thought the demand ought to be made on the third day of grace; that the nature of the acceptor's undertaking was to pay the bill on demand on any part of the third day of grace; and he inferred this from its having been, as he said, the practice to make the demand on that day. If it was a doubtful question in England so late as the year 1791 whether the demand ought to be made on the third day of grace or the day after, this bank is not chargeable with any culpable innovation upon long-established rules of law or usage by adopting the practice of making the demand on the fourth day.

It is said, however, that the effect of this testimony is to alter and vary by parol evidence the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it

<sup>1</sup> *Leftley v. Mills*, 4 Term Rep. 170.



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ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract, and it rests upon the same principle as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. The rule is adopted for the purpose of carrying into effect the intention and understanding of the parties. That the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the institution, and so understood by all parties, cannot admit of a doubt.

It would be a waste of time to go very much at large into an examination of the various usages and customs that are admitted in evidence and recognized in courts of justice, both in England and in this country, in almost every branch of business, and especially in commercial transactions, for the purpose of ascertaining the meaning and interpretation of contracts. A few only will be noticed that are somewhat analogous to the present case.

In the case of *Cutter v. Powell*,<sup>1</sup> where was brought under consideration the legal effect of a promissory note given to the mate of a ship for a certain sum of money, provided he proceeded on her voyage and continued to do duty to the port of destination. The legal construction to be given to this note was clear, and so considered by the court, that nothing was due unless the mate continued to do duty to the port of destination. He having died, however, on the voyage, the court directed an inquiry into the usage of merchants in such cases, declaring that if it sanctioned an allowance for the time the service was performed, the plaintiff should recover according to such usage.

No intimation is here given that such proof would be repugnant to the contract, although it was against the legal import of the note if construed without reference to the usage; and although the usage related to trade, it was very limited in its application.

So, in *Noble v. Kennoway*,<sup>2</sup> usage of trade was admitted in evidence to explain the understanding of parties in a policy of insurance, although

<sup>1</sup> 6 Term Rep. 320.

<sup>2</sup> 2 Doug. 510.

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the usage had not existed three years. Lord MANSFIELD said the usage could only be known by proof, and must be tried by a jury; that underwriters must be presumed to be acquainted with the practice of the trade they insure, whether recently established or not. If it were necessary, cases might be multiplied almost without end showing the same principle and same recognition of local and particular usages in almost every branch of business.

We have also, in the State courts in our country, the decisions of very enlightened judges adopting the same principles and governing themselves by the same rules, and in many cases not unlike the one before us.

In *Jones v. Fales*,<sup>1</sup> the same doctrine as to usages of banks was fully sanctioned: and although that particular usage might have been found in practice inconvenient, and not to meet public approbation, yet the principle which governed the decision of the court is not thereby weakened, namely: that the usage with which the defendant was conversant was proper evidence to be submitted to a jury, to infer from it the agreement of the party. And although, as suggested at the bar, this custom was altered by the banks, we do not find the courts of justice in that State attempting to control it in its application to notes made in reference to the usage.

The doctrine of this case was again fully recognized in *Lincoln and Kennebeck Bank v. Page*,<sup>2</sup> where it was held that, bank usages established respecting demands on makers of promissory notes and notices to indorsers being known to dealers in the banks, they were bound by them, and that the usage was proper evidence to be submitted to a jury. These cases are not referred to for the purpose of approving the particular usage, but to show that evidence of such usage was never considered as contradicting the written contract.

*Halsey v. Brown*<sup>3</sup> is a very strong case on this subject. The question was as to the liability of ship-owners for the loss of money taken on freight by the captain. The defence set up was that the master, according to established custom, was permitted to take money on freight as a perquisite to himself, and the owners discharged from responsibility; and the question directly presented to the court was whether a particular custom or usage could be given in evidence to control the general law. And the court says it is a principle that the general common-law may be, and in many instances is, controlled by special custom. So, the general commercial law may by the same reason be controlled by a special local usage, so far as that usage

<sup>1</sup> 4 Mass. 252.<sup>2</sup> 9 Mass. 155.<sup>3</sup> 3 Day, 346.

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extends, which will operate upon all contracts of this nature made in view of, or with reference to such usage.

In *Smith v. Wright*<sup>1</sup> this general principle is laid down: The true test of a commercial usage is its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it.

In the case of *Bank of Utica v. Smith*,<sup>2</sup> a note payable at the Mechanics' Bank in New York was presented and payment demanded fifteen minutes after bank hours; and this was held sufficient, it appearing that although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentments, and of this course of business the defendant ought to have informed himself.

It is unnecessary to pursue this subject further by particular reference to decisions in the State courts. The same doctrine as to the effect of particular usages in controlling the general law will be found to accompany the administration of justice wherever the subject is brought under consideration. Whether these usages are in all instances wise and beneficial may perhaps be questionable, but where they do exist they are considered as regulating and controlling contracts made under and in reference thereto.

The same principle is recognized by this court in the case of *Yeaton v. Bank of Alexandria*.<sup>3</sup> The chief justice, in speaking of the effect of usage upon the legal obligation of parties, observes, if the case showed that such was the usage of the bank and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties.

These cases are sufficient to show in the most satisfactory manner the light in which courts of justice consider contracts made in reference to any particular usage, and the effect that such usage is to have upon them. And no good reason is perceived why these principles should not be applied to the case before us. The custom under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day after the time limited for payment, is not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and

<sup>1</sup> 1 Caines, 43.

<sup>2</sup> 18 Johns. 230.

<sup>3</sup> 5 Cranch, 19.

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Georgetown. The defendant indorsed the note in question with full knowledge of the custom. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument, growing out of a usage here differing from that which is in practice in other places on this subject, are not of great public concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered. Their private interest is a sure guaranty for this.

But, admitting the practice to be inconvenient, and that a uniformity in this respect with other parts of the country would be desirable, the remedy is not in the hands of courts of justice, whose business it is to judge of contracts as made by parties themselves, and not to prescribe the manner in which they shall be made.

We are, accordingly, of opinion that the court below did not err in refusing to instruct the jury that the demand upon the maker of the note on the fourth day after the time limited for payment thereof discharged the defendant from liability on his indorsement.

*Judgment affirmed.*

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 11. COMMON CARRIERS—USAGES REGARDING THEIR GENERAL LIABILITY, AND THE MEANING OF TERMS IN BILLS OF LADING.
 

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GORDON v. LITTLE.\*

*In the Supreme Court of Pennsylvania, September, 1822.*

HON. WILLIAM TILGHMAN, *Chief Justice.*

“ JOHN B. GIBSON, }  
 “ THOMAS DUNCAN, } *Justices.*

1. The common-law liability of common carriers by water may be altered by usage.
2. The construction of the words, “ inevitable dangers of the river,” in a bill of lading of goods carried on an inland river, may be arrived at by evidence of custom and usage.

**ERROR** to the Common Pleas, in an action brought by Little against Gordon and Walker.

The plaintiff shipped certain goods on a keel-boat owned by the

\* Reported 8 Serg. & R. 533; 11 Am. Dec. 632.

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defendants, from Pittsburg to Hopkinsville, Kentucky, at a certain freight. The defendants' agents signed a bill of lading, promising to deliver the goods in good order and condition, and without delay, the inevitable dangers of the river only excepted," etc. The day after the goods were taken on board, the boat struck against a sunken log which lying at the landing at Pittsburg, and sank, damaging the plaintiff's goods, and this action was brought to recover for said damage. The declaration contained two counts: one on the special contract, and the other charging the defendants as common carriers.

The defendants offered evidence of a general usage or custom in relation to the liability of boatmen, amounting to an implied contract, but the court rejected it, except so far as such usage served to explain the common and commercial meaning of the words, "the inevitable dangers of the river," in the bill of lading. Exceptions were duly tendered and allowed to the rulings of the court in rejecting the evidence above mentioned, offered by the defendants.

The president of the court delivered an elaborate charge, stating the principles of law involved in the case and commenting upon the facts, but at the same time informing the jury that it was their province to judge of the facts. The whole charge was excepted to; but as the court did not pass upon the points contained in it, it is not deemed necessary to insert it. Verdict and judgment for the plaintiff.

*Baldwin and Ross*, for the plaintiffs in error, cited as to the evidence of a usage, *Carson v. Blazer*<sup>1</sup> and *Stultz v. Dickey*.<sup>2</sup>

*Biddle, Shaler, and Forward*, for the defendant in error, cited as to the evidence of usage, *Stoerer v. Whitman*.<sup>3</sup>

TILGHMAN, C. J. — Several exceptions were taken to the court's opinion on points of evidence during the trial of this cause, and an exception was also taken to the charge delivered to the jury.

The third exception was to the rejection of evidence offered by the defendants of the custom or usage which had prevailed at Pittsburg, and in the Western country in general, touching the liability of those persons who carried the goods of others for hire on the waters of the Ohio and Mississippi. The object of the defendants was to prove a custom by which the carriers were liable for losses only in case of negligence. The court rejected the evidence because in this case there was a written contract; but they were willing to admit, and did admit, evidence of usage or custom ascertaining the construction of the words, "inevitable dangers of the river," which had been introduced into this bill of lading.

<sup>1</sup> 2 Binn. 475; 4 Am. Dec. 463.

<sup>2</sup> 5 Binn. 285; 6 Am. Dec. 411.

<sup>3</sup> 6 Binn. 416.

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If the case had rested solely on the written contract, there would have been much to say in favor of the decision of the court, because, be the common law what it may, the parties have a right to alter or modify it by special contract; and when they have done so, the question is, What is the construction of the contract? In mercantile cases the usage of trade is often called in to explain words of doubtful import, although it would not be admitted to contradict the intent of the contract, expressed so clearly as to admit of no doubt. Where evidence of usage is admitted, the witnesses are confined to the fact of usage, and are not allowed to give their opinion. This is the law established by the best authority. I refer to the following cases: <sup>1</sup> *Winthrop v. Union Insurance Company*,<sup>2</sup> *Ruan v. Gardner*,<sup>3</sup> and *Frith v. Barker*.<sup>4</sup> That the court was right in admitting evidence of usage to ascertain the construction of the written contract in the present case, I am clear. "The unavoidable dangers of the river" are not more definite expressions than "the perils of the sea," the words usually inserted in bills of lading on maritime voyages. And in such bills of lading evidence of usage has been received. So long ago as the twenty-fourth year of Charles I. a question arose in the case of *Pickering v. Barkley*,<sup>5</sup> whether a taking by pirates was a peril of the sea. The case came before the court on a demurrer. Merchants and experienced mariners were examined, from whose evidence the court was satisfied that the taking was generally understood to be within the words of the contract, and decided accordingly. But, on the hearing of the trial of the case before us, it probably escaped the court that the question was not confined to the written contract, because there was a count in the declaration in which the defendants were charged as common carriers. If the plaintiff had failed in his count on the special contract, he might have recovered against the defendants as common carriers. It was incumbent on the defendants, therefore, to satisfy the court and jury that they were not liable as common carriers; and this they could not do but by showing that the strict common-law rule had not been received in the Western country. Strict, indeed, is the rule of the common law, for the carrier is liable for every accident not arising from the act of God or a public enemy. It was not always so.

Until England became a commercial country, the law of carriers was conformable to the general principles of bailment; that is to say, the carrier was liable only where he had not used ordinary care and vigi-

<sup>1</sup> Abb. on Ship., pt. 3, chap. 4, § 2; 2 Marsh. Dec. 207.

<sup>2</sup> 2 Wash. C. Ct. 7.

<sup>3</sup> 1 Wash. C. Ct. 145.

<sup>4</sup> 2 Johns. 327; 2 Marsh. Dec. 208.

<sup>5</sup> 1 Sty. 132.



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lance. It was so understood in the reign of Henry VIII.<sup>1</sup> But when commerce became extended, under the flourishing reign of Elizabeth, it was thought expedient to adopt a stricter rule, in order to guard against frauds and collusions easily practised but hard to prove. In England the rule has been rigidly observed, for the sake of maintaining what the courts have considered as a public convenience, though not without now and then a struggle, in cases of extreme hardship on the carrier, where the loss has been by fire or robbery. The law as held by modern judges will be found in *Forward v. Pittard*,<sup>2</sup> *Hyde v. Trent and Mersey Navigation Company*,<sup>3</sup> and *Elliot v. Rossell*.<sup>4</sup> But although the courts have not relaxed, yet the rule has been considered by the public as more severe in some instances — as, against carriers by water — than was consistent with justice. And accordingly, about the year 1795, the usual form of charter-party was altered in England, and now stands as follows: "The act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted."

The Parliament has also interfered in favor of carriers by water, for by statute<sup>5</sup> they are relieved from liability in case of fire on board any ship or vessel; neither are they liable for "gold, silver, diamonds, watches, or precious stones lost in a ship or vessel by robbery, embezzlement, making away with, or secreting, unless inserted in the bill of lading, or notice given in writing, stating the articles and their value." An attempt was afterwards made to carry the thing farther, and to reduce the liability of carriers by water to losses which happened through the fault or negligence of the master or mariners. A bill to this effect passed the House of Commons, but was rejected by the Lords.<sup>6</sup> This sketch of the English law will be important when we come to consider the propriety of admitting evidence by the custom of the Western country. With regard to carriers by land, the law has been here as in England. Public convenience requires it, nor have I heard a suggestion of any doubt on the subject. But with regard to carriers by water, the law has not been considered as settled.

There is said, indeed, to have been a decision at *Nisi Prius* by Chief Justice McKEAN and Judge YEATES that carriers on the river Susquehanna were liable as common carriers. But we have no report of that case, and it probably was decided without much argument or consideration. The point came before this court in *Dean v. Swoop*.<sup>7</sup> The

<sup>1</sup> Jones on Bail, 102, 103.

<sup>2</sup> 1 Term Rep. 27.

<sup>3</sup> 5 Term Rep. 389.

<sup>4</sup> 10 Johns. 9; 6 Am. Dec. 306.

<sup>5</sup> 26 George III., c. 80; Abb. on Ship., pt. 3, chap. 4, § 8.

<sup>6</sup> See Abb. on Ship., pt. 3, chap. 4, § 1.

<sup>7</sup> 2 Linn. 72.



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court perceived its importance, and declined giving an opinion of it, as it was unnecessary, the cause admitting of a decision on another point. The navigation of the Susquehanna and the Westerly waters is quite a new thing. Its origin may be dated posterior to our independence. Prior to that it did not deserve the name of navigation, nor could there have been any custom about it. Many parts of the English common law have been rejected as improper for the condition of this Commonwealth. To what extent that common law has been reserved in the navigation of our rivers is, in my opinion, fairly open to investigation. It is to be understood, however, that it lies upon him who sets up a usage departing from the common law to prove it to the entire satisfaction of the court and jury. It was remarked by this court, in the case of *Carson v. Blazer*,<sup>1</sup> that our rivers were so different from those of England that the same laws respecting the property fisheries would not suit the two countries, nor had the English law on that subject been received in Pennsylvania.

I will not say that the English law of carriers by water is inapplicable to this country; but whether it has been adopted in its full extent is a fact worthy of investigation. Unless a custom or usage is most clearly established to the contrary, I should think that the carrier was liable for every accident which skill, care, and diligence could have prevented. What may be called the act of God has sometimes occasioned difference of sentiment. But the best opinion is that the act of God is something in which the act of man has no part — such as lightning, tempest, wind, etc. In our rivers, which are interspersed with falls and rapids, a sudden flow, not amounting to storm or tempest, might have such an effect as to defeat all human skill and diligence, and should be considered as the act of God. There is great reason why the carrier should be liable for all kinds of embezzlement, stealing, and robbery, except by the public enemy; for in these cases collusion may be so artfully concealed that it would be almost impossible to detect it. But we need not take such large ground for the decision of the question before us, which is whether, on the count against the defendants as common carriers, they might not be permitted to prove a usage different from the common law? And for the reasons already given, as well as many others which might be given, I am well satisfied that the evidence was admissible. On the written contract it would be premature to make any remarks, because the court admitted evidence of usage to explain its construction, and there is no question on that point before us.

GIBSON, J. — As to the admissibility of evidence of a custom pecu-

<sup>1</sup> 2 Binn. 475; 4 Am. Dec. 463.

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liar to the carrying business of the Ohio. It is settled that a common carrier is answerable for every degree of negligence between the determinate point of ordinary diligence and that where the least imaginable shade of negligence begins. He is, in effect, an insurer against all perils except those which are produced by a sudden commotion or change in the state of the elements, and which no human skill can avoid or human force overcome, and those which arise from the hostile array of a foreign force. The difference between a carrier and any other bailee for hire is in all cases founded on maxims of public policy and public convenience, as much as it is in the particular instance of liability for a loss by robbery, which Sir WILLIAM JONES considers an exception to the general rule of responsibility, rather than a part of the rule itself. The law raises a conclusive presumption against the carrier not only in the case of robbery, lest a confederacy should be formed between him and thieves, without a possibility of detection, but in all cases except those just now mentioned, because it prevents the necessity of proof of facts impossible to be made in one case in a thousand by the owner of the goods. The carrier alone can give any account of the loss and its attendant circumstances. In some cases his servants might be called; but, necessarily participating in whatever negligence there may have been, and being answerable to their employer, to expect them to be impartial witnesses would be against reason and all experience. The law, therefore, does not stop to compute the *quantum* of care that has been bestowed; it declares the carrier liable for the slightest negligence, and assumes what is true in fact: that no loss can happen without some degree of it, unless in the excepted cases already mentioned, and it imposes on him the burden of proving that the loss proceeded from a peril within one of the exceptions. He must, therefore, either stipulate for a premium adequate to the risk, or restrain his responsibility by a special acceptance of the goods; if he has done neither, the acceptance must be taken to have been in reference to his duties at the common law.

I have thus stated the common-law responsibility of a carrier, together with the reason for it, in order to show that no one can refuse his assent to the wisdom and salutary tendency of its policy in the abstract. The only question is as to its applicability to the carrying business of the Ohio in particular. For I take it to be indisputable that the common-law measure of responsibility, as a general rule, is as applicable to a carrier by water from place to place within the State, or from a place within the State to another in a neighboring State, as it is to a carrier from a place beyond the sea, or by land; and it is expressly held

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so by the most respectable courts of our sister States, as is shown by *Elliot v. Russell*,<sup>1</sup> where the decisions in the different States are cited. And in *Bell v. Reed*<sup>2</sup> the principle seems to have been conceded by this court; and in *Lea v. Stroud* it was expressly so. This, although a *Nisi Prius* decision, is undoubtedly of weight to show the view that was taken of the law as respects the Susquehanna. The question, then, is as to the applicability of the common-law rule with respect to the Ohio. Now, what is there to distinguish that river from the other rivers of the State? Its navigation is not more perilous; and if it were, the carriers might exact a compensation adequate to the risk; the nature of the business, the facility to practise fraud without detection, and the impossibility of showing want of due diligence are the same. But the common law is supposed to be altered with respect to the river by a custom. Before we examine that matter, let us ascertain what is the law with regard to customs.

These are: 1. General, which constitute the universal law of the country; or, in other words, the common law. 2. Particular, which operate in and are confined to particular districts, and in England. 3. Particular laws, which are recognized by particular courts of general jurisdiction; or, in other words, the civil and canon law, which with us are so blended with the common law as to have become part of it.<sup>3</sup> Now, general customs are never proved before the jury, but are determined by the judges.<sup>4</sup> In *Conseque v. Willings*,<sup>5</sup> it was held by the Circuit Court of the United States for the District of Pennsylvania that where the common law is changed by a general custom, it must have prevailed so notoriously as to enable the judges to take notice of it without pleading or evidence. In *Carson v. Blazer*, the court from their own knowledge established the deviation from the common law, without referring the matter to a jury. It would, in truth, be an inversion of their respective functions for the court to receive the law from the jury. It will not be pretended that the finding of a general custom would be good; and if so, the evidence was clearly inadmissible to establish a general custom.

Now, what is the custom relied on here? Not a general one, pervading the State, for such would be part of the common law, and determinable by the judges. It was attempted to be established as a particular custom, and as every particular custom must necessarily be, by evidence before the jury; and I care not whether, as having the dignity

<sup>1</sup> 10 Johns. 1; 6 Am. Dec. 306.

<sup>2</sup> 4 Binn. 127; 5 Am. Dec. 393.

<sup>3</sup> 1 Bla. Comm. 69.

<sup>4</sup> *Id.* 67.

<sup>5</sup> 1 Pet. C. Ct. 225.

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of a law of local obligation and superseding the common law within the district where it is supposed to prevail, or as performing the more humble office of a usage of such notoriety as to be presumed to have entered into the stipulations of the parties, and tacitly to have become a part of their agreement, the result is in either case the same. With us, particular customs have no force. I know not a greater or a more embarrassing evil than a law of merely local obligation. The rule of the carrying business of the Ohio ought to be that of the Juniata, the Susquehanna, the Delaware, and their tributary streams. Suppose a different usage to exist in respect to each, is there to be different law in respect to each? In fact, that result would be inevitable; for I understand the evidence to have been offered to a custom peculiar to the Ohio, and it will hardly be expected that a usage the same in every particular should prevail with respect to all our rivers. It is impossible to get away from the conclusion that by giving the usage any further effect than that of a convenient subject of reference to explain a latent ambiguity in the expressions of the parties, where their meaning would be otherwise doubtful, we repeal an established principle of the common law — a matter which, I apprehend, is not open to us. So that, view the subject as we may, this custom or usage, if it have any operation besides what I have just assigned to it, must have it as a rule of paramount obligation within a particular district, and not as the general law of the land. But in *Bowen v. Jackson*<sup>1</sup> it was held by the Circuit Court of the United States that evidence, even of a usage of trade, is inadmissible when the law on the subject is settled; and also by the same court, in *Winthrop v. Union Insurance Company*,<sup>2</sup> that opinions as to the construction of a contract are not evidence; and in *Henry v. Risk*<sup>3</sup> it was held that a witness cannot be admitted to contradict the established principles of the law. In *Stoeper v. Whitman*<sup>4</sup> the very principle under consideration was decided by this court, by whom it was held that evidence of a custom in a particular place, different from the common law, to reënter for a forfeiture incurred by non-payment of rent, is inadmissible, the chief justice who delivered the opinion of the court declaring that miserable would be our condition if property were to depend, not on the contract of the parties, expounded by established principles of law, but on what is called the custom of particular places, so that we might have different law in every town and village of the State. The same mischief would arise from having different law with respect to the navigation of every river of the State. But, even if we

<sup>1</sup> Whart. Dig. 252.<sup>2</sup> *Ibid.*<sup>3</sup> 1 Dall. 265.<sup>4</sup> 6 Blun. 416.

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had the power, what inducement have we to alter the common law? Would its rule of responsibility, when applied to the carrying business of the Ohio, produce evils which are not felt in its application to that of the other rivers of the State, or to carrying by land?

We are to recollect that our decision will owe its importance, not to the value of the property immediately involved (although that is considerable), but to the rule it may establish for the future; and if such rule be not the most convenient, the parties have in every case power to establish a particular measure of responsibility for themselves. It is only where they have neglected to explain themselves fully that some preëstablished rule, to which they are supposed to have referred, becomes necessary. Now, it is supposed that a usage has existed without even any knowledge of a preëxisting rule, which consequently indicates the wholesome and convenient measure. To me, however, it seems that no measure or rule — if it can be so called — which is altogether uncertain in its nature can be either wholesome or convenient. If we go by the common law, we shall have a definite, known rule, which, applied to the facts by the court, will produce as much certainty of result as legal proceedings are susceptible of; if we go by the usage, the whole matter will have to be determined by the jury, on evidence of the common practice and understanding on the subject, which would be to go by no rule at all. So that the right to compensation will in every instance depend on what the jury may think the proper degree of diligence. We should be perpetually inquiring by a jury as to what is the law of the land; and the degree of diligence required by the carrier would be as fluctuating as the opinions of the witnesses called to establish it.

That the common law has not been so altered as to contract the responsibility of carriers by water is proved by *Lea v. Stroud* and *Bell v. Reed*. The business of the Delaware and Susquehanna furnishes nothing like a custom; for on these, as well as on their tributary streams, carrying for hire is little known. The produce of the country is for the most part taken to market in flat-bottomed boats purchased by the owners of it, and navigated by hands that receive daily wages. The bargemen — who are, strictly speaking, common carriers — were, till lately, mostly employed in transporting merchandise up these rivers, a sort of navigation in which there is so little of peril that with ordinary diligence a loss can scarcely ever occur; and that furnishes a satisfactory reason why there is no instance of an action having been brought against one of these where the negligence was not gross and palpable. These remarks are applicable only to that part of the Delaware where

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the tide does not flow, the carrying business from abroad to the port of Philadelphia being governed as well by the maritime as the common law.

I have said the usage would have been competent, not as a rule of paramount obligation, but as subservient to explanation of a latent ambiguity in the bill of lading, if that term may with propriety be applied to a fresh-water transaction. I do not say there was in fact any ambiguity in the paper signed by the agent of the defendants. The words, "unavoidable dangers of the river," seem to me equipollent to the words, "perils of the seas," in a policy of insurance; and these are well understood to mean those dangers which arise from tempests, storms, rocks, and sands; they are, in fact, the unavoidable dangers of the seas. There are indeed other dangers that may justly be said to be of the seas, but as these may be averted by human effort, the risk from them must be borne by the master or owner, and not by the underwriter, who is an insurer against only extraordinary perils; so that it may, in general, be said the responsibility of the one begins where that of the other ends, the goods being covered from all risk whatever. It is, therefore, fair construction to say the excepting of the unavoidable dangers of the river meant no more than the exception which is made by the common law.

I at first thought that, as the carrier was in effect an insurer, the usage of the particular river might be permitted to operate on the contract, just as the usage of a particular trade is permitted to operate on the contract of insurance. But the relaxation of the common-law rules of evidence in the case of a policy arises from the clumsiness of the instrument, which has undergone little or no alteration since it came into use, although the ever-varying circumstances of trade have produced a variety of corresponding modifications of its obligation which is often independent of its terms. Hence, the usage of every particular trade necessarily enters into every policy, and is resorted to for the purpose of explaining and even controlling those parts of the instrument which are merely formal. The contract of the carrier, however, is quite a different thing. It is not in the form of an instrument; but the parties are supposed to express their meaning specially, without regard to form. It is not a contract of indemnity; and that the carrier is an insurer is not its object, but the consequence of the extraordinary diligence he is bound to use. It is, therefore, to be construed strictly according to the rules of the common law. It seems to me, therefore, the only error the judge committed was in favor of the defendants below, in permitting them to give evidence of the commercial meaning of the words



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"unavoidable dangers of the river," which were too clear of themselves to admit of interpretation.

Concurring with my brethren that the other errors have not been sustained, I am of opinion that the judgment ought to be affirmed.

DUNCAN, J., delivered an opinion concurring with the chief justice.

*Judgment reversed and a venire facias de novo awarded.*

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 12. SAME—USAGES EXCUSING NOTICE OF ARRIVAL OF GOODS.
 

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FARMERS AND MECHANICS' BANK v. CHAMPLAIN TRANSPORTATION COMPANY.\*

*In the Supreme Court of Vermont, January, 1844.*

HON. CHARLES K. WILLIAMS, *Chief Justice.*

" ISAAC F. REDFIELD,	} <i>Judges.</i>
" MILO L. BENNETT,	
" WILLIAM HEBARD,	

1. Evidence of the usage of business of the carrier and of the public is receivable to show what class of property the carrier is responsible for as such, when his liability commences, and when it ceases.
2. Where the defendants, who were common carriers on Lake Champlain, were intrusted with a package of bank-bills to carry from B. to P., directed to the cashier of the bank at P., and they delivered them to the wharfinger of the wharf at P., at which place their boat touched, from whom the package was stolen, in an action by the consignors for the loss: *held*, on the first appeal, that it was competent for the defendants to prove that it was their uniform usage, well known to the plaintiffs, to deliver such packages of money, when intrusted to them, to the wharfinger having charge of the wharf where the boat landed, without giving any notice to the consignee. *Held, further*, on a second appeal, that it was not essential to show that the plaintiffs had actual knowledge of this usage.

TRESPASS on the case against the defendants as common carriers of goods, etc., from Burlington to Plattsburgh, New York. The declaration alleged that the plaintiffs delivered to the defendants, and the defendants accepted a package of bank-bills amounting to \$1,109, directed to Richard Yates, Esq., cashier of the Clinton County Bank, at Plattsburgh, "to be safely and securely carried and conveyed by the said defendants from Burlington aforesaid to Plattsburgh aforesaid, and then, to wit, at said Plattsburgh, safely and securely to be delivered to said Richard Yates, Esq., cashier;" but that the package was never delivered as directed,

\* Reported 16 Vt. 52.



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but through the negligence and carelessness of the defendants was lost. Plea: the general issue, and trial by jury.

It appeared on trial that the package was delivered by the teller of the plaintiffs' bank to the captain of the defendants' ferry-boat June 5, 1839, and that when the boat arrived at Plattsburgh the captain delivered the package to one Ladd, the wharfinger, to carry to the bank, but that while in Ladd's possession it was stolen, and never reached the bank. As to whether there was any particular understanding or agreement between the teller and the captain that the latter should deliver the package to Yates or at the bank in Plattsburgh, the testimony was contradictory.

It was conceded that the defendants' boat, at that time and during the season, was engaged in transporting goods, etc., from Burlington to St. Albans, touching at Port Kent and Plattsburgh only long enough to discharge and receive freight and passengers. The court having intimated to the counsel that they should charge the jury that though the defendants might be common carriers of ordinary goods, etc., yet it was not to be taken *prima facie* that they were common carriers of bank-bills, the plaintiffs introduced evidence tending to prove that the defendants, prior to and until the time of the delivery of the package in question, had not only held themselves out to the public as common carriers of bank-bills as well as of ordinary goods, etc., without distinction, but had in fact become such by their course of business.

The defendants thereupon offered to prove — which had been before offered by them and excluded by the court — that it had ever been the constant, uniform, and unvaried usage and custom of all the boats belonging to the defendants, and of all the masters and officers thereof, and particularly of this ferry-boat, when they received packages of money like the one in question, to carry to any place on the lake, and particularly to the bank at Plattsburgh, to deliver them to the wharfinger, for him to carry to the bank, as was done in this case, and not to the consignee, and this without giving any notice to the consignee; and that this uniform custom was well known to the cashier of the plaintiffs' bank, and to Dr. Peck, president and a director of said bank at the time of the delivery of said package. This was objected to by the plaintiffs and excluded by the court. Exceptions by the defendants.

The jury returned a verdict for the plaintiffs.

C. Adams and D. A. Smalley, for the defendants. — The plaintiffs count upon a special undertaking to deliver the package to Richard Yates, at the Plattsburgh bank. Upon this point the testimony was contradictory; and how the fact was found does not appear, nor whether that

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question was submitted to the jury. It was competent for the parties to have made such special contract, and on proof of it the plaintiffs might have recovered; but in that event the general liability of common carriers would not have been drawn in question.<sup>1</sup> The case, apparently, was put upon the ground that such contract was unimportant, and that the ordinary duty of carriers involved the same duty. But the defendants, as carriers by water, would not necessarily be carriers beyond the wharf at Plattsburgh; and if there was any undertaking to carry beyond the wharf, it must be proved by an express contract to that effect, or implied from the general course of business, or the particular usage which had obtained between these parties.<sup>2</sup> The undertaking of carriers of goods generally is satisfied by a delivery of the articles at the usual wharf at the port of delivery.<sup>3</sup> In this case, then, the plaintiffs must show a distinction between the liability of carriers of goods generally and carriers of packages of bills. Carriers may, it is true, extend their business to carrying packages of bills, but it is at their election whether they will do so.<sup>4</sup> Whether carrying packages of bills came within the defendants' ordinary business was matter of evidence. The plaintiffs had a right to prove "that the defendants had become carriers of bills as well as of ordinary goods and merchandise;" and this right in the plaintiffs involves a corresponding right in the defendants to introduce evidence to rebut it.<sup>5</sup> The defendants, then, should have been permitted to prove their uniform custom relative to the delivery of packages at the wharf to the wharfinger, without notice to the consignee, and the knowledge of the plaintiffs of the existence of this uniform custom.<sup>6</sup>

*C. D. Kasson*, for the plaintiffs. — 1. The case shows that the jury found (1) that the defendants were common carriers; (2) that they were common carriers of this species of property; (3) that they received the package in question as common carriers, and that the captain, in receiving the package, acted as captain and agent for and in behalf of the defendants. The duties of a common carrier are such as are affixed to this vocation by law, and do not result from the contract. The delivery by the consignor and acceptance by the carrier are all that is necessary;

<sup>1</sup> *Garside v. Navigation Co.*, 4 Term Rep. 581; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 389; *Golden v. Manning*, 2 W. Black. 91c; *Ackley v. Kellogg*, 8 Cow. 223; *St. John v. Van Santvoord*, 25 Wend. 660.

<sup>2</sup> *Platt v. Hibbard*, 7 Cow. 497.

<sup>3</sup> *Chickering v. Fowler*, 4 Pick. 371; *Abb. on Ship*, 33.

<sup>4</sup> *Story on Bail*, 300, 301, 328; *Sewall v. Allen*, 6 Wend. 335.

<sup>5</sup> *Sewall v. Allen*, 6 Wend. 335.

<sup>6</sup> *Gibson v. Culver*, 17 Wend. 305; *Ostrander v. Brown*, 15 Johns. 39; *Story on Bail*, 345, 346; *Rushforth v. Hadfield*, 7 East, 224; *Cole v. Goodwin*, 19 Wend. 251; *Garside v. Navigation Co.*, 4 Term Rep. 582; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 390; *St. John v. Van Santvoord*, 25 Wend. 660; *Blin v. Mayo*, 10 Vt. 56; 2 Kent's Comm. 604, 605; *Story on Bail*, 343-346, 352, 566; *Sewall v. Allen*, 6 Wend. 335.

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the law then steps in and helps out the contract by adding thereto the duty of transport and delivery to the consignee.<sup>1</sup> The duty is not confined to the mere carrying, but extends also to a delivery to the consignee, or a delivery at some proper place with notice to the consignee.<sup>2</sup> 2. The duty being to carry and deliver, we contend (1) that the defendants cannot restrain it by any implied contract or particular usage; and (2) that they have not so done in this case. The case shows that the package was at least delivered to the defendants, and by them accepted, as carriers. This is sufficient to constitute the necessary contract, and *ipso facto* devolves upon the carriers the duty of transport and delivery.<sup>3</sup> 3. The case further shows that the parcel was directed to "Richard Yates, Esq., cashier, Plattsburgh, N. Y." The carrier must deliver according to the direction; and when no direction is given except the address upon the parcel, that is his "direction."<sup>4</sup> 4. The case admits that the boat ran to Plattsburgh, and that the direction of the parcel was at Plattsburgh. The term "Plattsburgh," to which the defendants were common carriers, is *nomen collectivum*, and extends at least to the whole port, or village, or settlement at, on, about, or near "the landing."<sup>5</sup> 5. The usage, which the defendants offered to show was inadmissible, as contravening the general law of the land.<sup>6</sup> We do not deny that usage is admissible in some cases arising under the law-merchant, — usages of trade to determine the liability of underwriters on questions of

<sup>1</sup> Lane v. Cotton, 1 Salk. 143; s. c. 1 Ld. Raym. 649, per Powys, J., and 652, per Lord Holt; Coggs v. Bernard, 2 Ld. Raym. 918; Upshare v. Adee, Com. 25; Gosling v. Higgins, 1 Camp. 451; Forward v. Pittard, 1 Term Rep. 33; Riley v. Horne, 5 Bing. 217.

<sup>2</sup> Rich v. Kneeland, Cro. Jac. 330; per Lord Holt in Lane v. Cotton, 1 Ld. Raym. 652; Taylor v. —, 2 Ld. Raym. 792; Brown v. Hodgson, 4 Taun. 189; Hyde v. Trent Nav. Co., 5 Term Rep. 390; in re Webb, 2 J. B. Moo. 500. Story on Bail. 345-347; Hatchwell v. Cooke, 6 Taun. 577; Rodenham v. Bennett, 4 Price, 31 (cited in Duff v. Budd, 6 J. B. Moo. 469); Griffith v. Lee, 1 Car. & P. 110; Orange Bank v. Brown, 3 Wend. 161; De Mott v. Laraway, 14 Wend. 226; Elliot v. Russell, 10 Johns. 1; Ostrander v. Brown, 15 Johns. 39; Hollister v. Nowlen, 19 Wend. 239; Bowman v. Teall, 23 Wend. 306; St. John v. Van Santvoord, 25 Wend. 660; per Verplanck, Sen., in Powell v. Myers, 26 Wend. 596; Sewall v. Allen, 6 Wend. 335.

<sup>3</sup> Rich v. Kneeland, Cro. Jac. 330; per Lord Holt in 1 Ld. Raym. 652; Taylor v. —, 2

Ld. Raym. 792; Tichburne v. White, Stra. 145; Stuart v. Crawley, 3 Stark. N. P. 323; Orange Bank v. Brown, 3 Wend. 161; Hollister v. Nowlen, 19 Wend. 239; Camden, etc., Transp. Co. v. Belknap, 21 Wend. 334; St. John v. Van Santvoord, 25 Wend. 660.

<sup>4</sup> Rich v. Kneeland, Cro. Jac. 330; Taylor v. —, 2 Ld. Raym. 792; Hatchwell v. Cooke, 6 Taun. 577; Birkett v. Willan, 2 Barn. & Ald. 356; Stephenson v. Hart, 4 Bing. 476; and St. John v. Van Santvoord, 25 Wend. 596, where the case was identical with this on this point.

<sup>5</sup> Birkett v. Willan, 2 Barn. & Ald. 356; Beckford v. Crutwell, 5 Car. & P. 242; Ostrander v. Brown, 15 Johns. 39.

<sup>6</sup> Upshare v. Adee, Com. 25; Oppenheim v. Russell, 3 Bos. & Pul. 45; Ostrander v. Brown, 15 Johns. 39; Bryant v. Commonwealth Ins. Co., 6 Pick. 146; Eager v. Atlas Ins. Co., 14 Pick. 141; Crosby v. Fitch, 12 Conn. 410; Cole v. Goodwin, 19 Wend. 259; Clark v. Faxton, 21 Wend. 152; Gould v. Hill, 2 Hill, 624 (citing opinion of Story, J., in case of The Reeside, 2 Sumn. 567).

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deviation, etc., etc., — but it will be observed that in these cases the law itself is based upon particular usages in particular places or in particular trades. 6. We claim that if it be permitted to make an interpolation into the common law by local usage, this usage does not attain to that dignity. We are aware that in some few instances courts have held that the general course or usage of trade in a given port will govern the mode of fulfilling the obligations imposed by law upon carriers. But, on the fullest examination of all the cases, not one is to be found where even in the *obiter dicta* of the judges they have ever allowed that the mere usage of the particular carrier himself would be sufficient to subvert the law of the land, or in anywise affect his liability, excepting the case of *Gibson v. Culver*.<sup>1</sup> That was a case of a mail-coach, and COWEN, J., who delivered the opinion, lays stress on that fact. But all the cases on which that opinion is based are mere *obiter dicta* of the judges, or cases of a general, uniform, notorious local custom of the place or of trade. But that case has been substantially overruled by the same court in *Hollister v. Nowlen*.<sup>2</sup> It is, moreover, in direct hostility to the whole course of English decisions, and the former decisions in New York, *Ostrander v. Brown*, and many other cases. It conflicts with Judge STORY in the case of *The Reeside*,<sup>3</sup> and finds no warrant in Lord KENYON's speculations in *Hyde v. Trent Navigation Company*.<sup>4</sup> In which the other judges differed from him, for he only doubted as to the effect of the general usage of trade or of the place. In *Gatliffe v. Bourne*<sup>5</sup> an attempt was made to raise the question made in this case, but it failed on demurrer to special pleas; and it is well remarked by BRONSON, C. J., in *Hollister v. Nowlen*,<sup>6</sup> that the doctrine, if it ever existed in England, is long since exploded. If such a usage can discharge the carrier, then, as was well said by BRONSON, C. J., in *Cole v. Goodwin*, "a usage of mere neglect" may be interposed to justify him. 7. But the usage offered to be shown is no usage. The offer was to show that the captain was in the habit of delivering to Ladd, "for him to carry to the bank." Ladd, then, acted as agent for the boat. Neither the consignees nor the plaintiffs ever employed him, but the captain did. It is a mere offer to show that the defendants have used a course of negligence in delivering goods, or else to show in what manner they have hitherto done, or procured to be done, their own business.

<sup>1</sup> 17 Wend. 305.<sup>2</sup> 19 Wend. 239; *Cole v. Goodwin*, 19 Wend. 251; *Clark v. Faxton*, 21 Wend. 152; *Bowman v. Teall*, 23 Wend. 306; *St. John v. Van Santvoord*, 25 Wend. 669; *Gould v. Hill*, 2 Hill, 624.<sup>3</sup> 2 Sumn. 567 (cited in 2 Hill, 624).<sup>4</sup> 5 Term Rep. 390.<sup>5</sup> 2 Mod. & R. 100.<sup>6</sup> 19 Wend. 239.

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WILLIAMS, C. J., delivered the opinion of the court.

This case has been elaborately argued, but I apprehend it does not involve an investigation of all the law and learning bestowed upon it. The first question, as to the interest of Mr. Warner, the cashier, it is not necessary to decide, as the case is to be sent for another trial on another point, and it is in the power of the plaintiffs to remove all questions on this subject by executing to Mr. Warner a release of all claims on him arising out of this transaction. The court are of opinion, on the other questions raised, that the evidence tending to prove custom and usage, and the knowledge of the plaintiffs, should have been admitted.

Whoever hold themselves out to the world as common carriers must do all required of them as such by law, and may not refuse in particular instances without sufficient cause. Hence, when the defendants held themselves out as common carriers of goods or money from Burlington to Plattsburgh, or elsewhere, they assumed all the duty and responsibility attached to them in that character. It becomes, therefore, important to them, as well as the community generally, to ascertain what are those duties, and how far they can be modified by contract, usage of business, or their particular usage. No one seems disposed to question but that they were responsible for the safe-keeping of money or goods from the time they received them until they delivered them at the place of their destination, notwithstanding the loss may have happened without any fault on their part. And if the law is as strict and unbending as the counsel for the plaintiffs contend, no proprietors of steamboats, railways, or stages could with safety or propriety become common carriers: nor if it be their duty, from which they cannot exempt themselves, to deliver every package or parcel intrusted to their care, to the individuals to whom they may be directed. The boats do not stop at the different landing-places long enough to deliver to every individual in that town the parcel directed to him. Railroad cars cannot deviate from their track, nor stages go to the house of every individual on their route, and of course they must employ responsible agents to perform that which they cannot do themselves. I apprehend, however, that this burden is not thrown on them, but they may prescribe the mode, the manner, and the place where they will deliver the goods, and those who are acquainted with their rules and regulations in this particular must abide by the consequences. In the case of *Garside v. Proprietors*,<sup>1</sup> it was determined that the duty of the defendants as carriers ceased when the goods were landed at Manchester, although they were put into the

<sup>1</sup> 4 Term Rep. 530.

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warehouse of the defendants, and were there consumed by an accidental fire.

The duty of the carrier commences when the goods are delivered to him, and it is conceded that a personal delivery is not required. He may give notice where he will receive goods, at what place they may be deposited, and his usage and custom in this particular, it has never been doubted, is sufficient to charge him with the reception and the commencement of his risk. His usage, as well as the usage of business, is to be received as competent and proper evidence to show when the goods are to be considered as coming into his custody. I see no good reason why the same evidence should not be received to show the time of his undertaking, the place where, or the person to whom he contracts to deliver goods intrusted to his care. And if the person who employs the carrier knows of this, he cannot contend that the undertaking of the carrier was more extensive. I apprehend it will be found, on an examination of the authorities, that when connecting lines are employed in the transportation of goods, and when the employment of wharfingers or receivers as independent carriers is requisite in order to forward goods, etc., to their ultimate destination, the liability of the first carrier will depend entirely on the fact whether, by the contract, the wharfingers, etc., are to be considered as his agents, and subsidiary to his undertaking. But when it is understood by the contracting parties that he is to deliver them to another, or at a place certain, the duty of the carrier terminates at that particular place, and the responsibility ceases on the delivery at that place to, and the receipt by any person authorized there to receive them.

The first case which has a direct bearing on the case before us is *Garside v. Proprietors*,<sup>1</sup> where the defendants were carriers from Stourport to Manchester. Goods of the plaintiff were forwarded from Stourport, directed to Stockport, beyond Manchester, by the defendants; they landed them at Manchester and put them into their own warehouse, where they were destroyed; and, inasmuch as it appeared that according to the usage of business it was usual thus to deposit them when there was no carrier from Stockport to receive them, the defendants were held not to be liable, as the goods at the time of the fire were in their custody as warehousemen. Now, it is to be observed in this case that the goods were destined to a place beyond Manchester; that the defendants, as carriers, received them without direction, and, moreover, that they had agreed to forward them to Stockport by the first carrier that should arrive. The authority of this case is recognized by Judge

<sup>1</sup> 4 Term Rep. 581.

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STORY in his treatise on Bailments, and was also recognized in the case of Hyde against the same defendants,<sup>1</sup> although a majority of the judges thought it to be the duty of a carrier to deliver goods to the persons to whom directed; but the usage of trade and business as modifying the undertaking and regulating the place of delivery was recognized. In the case of *Wardel v. Mourillyan*,<sup>2</sup> Lord KENTON, instead of considering the duty of carriers to deliver to the persons to whom directed as absolute and unqualified, left it to the jury to say what was the custom. In the case of *Cutley v. Wintringham*,<sup>3</sup> evidence of custom was received to ascertain whether goods had been actually delivered or not. The case of *In re Webb*<sup>4</sup> recognized that the duty of carriers may by contract be suspended, and they become warehousemen between the time of the reception of goods and their delivery at the place of their ultimate destination.

The case of *Gibson v. Culver*<sup>5</sup> is more immediately applicable to the present, as it seems to be similar in many respects. It was considered in that case that it was competent for the defendants, who were the owners of a stage from Sand Lake to Albany via Troy, and had received a box of combs directed to Messrs. Vail & Co., Troy, to show that it was the uniform usage and course of business in which they were engaged to leave goods at their usual stopping-place in the towns to which the goods were directed, without notice to the consignees, and that if such usage was known to the plaintiff, or if it was of so long continuance as to justify the jury in finding that it was known to the plaintiff, the carrier would be discharged. The authority of this case seems to be so decisive of the case before us, that to obviate it the plaintiffs have to contend that it has in effect been overruled. In the cases of *Hollister v. Nowlen*<sup>6</sup> and *Cole v. Goodwin*,<sup>7</sup> where the defendants were carriers of passengers, other points were raised and discussed, as to how far carriers could limit their common-law liability as to the safety of goods by a general notice; yet the case of *Gibson v. Culver* was not impugned, but its authority recognized. In the case of *St. John v. Van Santvoord*,<sup>8</sup> the same doctrine contained in the case of *Gibson v. Culver* was recognized and acted on. In the case of *Gould v. Hill*,<sup>9</sup> common usage and a general notice is considered as evidence, and that it may be urged as a foundation for modifying the contract; and, moreover, Chancellor KENT, in his Commentaries, expressly recognized

<sup>1</sup> 5 Term Rep. 389.

<sup>2</sup> 1 Esp. 603.

<sup>3</sup> Peake N. P. 150.

<sup>4</sup> 8 Taun. 443.

<sup>5</sup> 17 Wend. 305.

<sup>6</sup> 19 Wend. 234.

<sup>7</sup> 19 Wend. 251.

<sup>8</sup> 25 Wend. 660.

<sup>9</sup> 2 Hill, 623.



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the authority of the case of *Gibson v. Culver*. The principle acknowledged and established in this case is so consonant with reason and propriety and appears to me to be so necessary to enable persons to avail themselves of the facilities afforded by stages, steamboats, and railroad cars to transport goods, parcels, and packages of money, and which the owners would be compelled to abandon if they were legally liable to deliver them at all events to the persons to whom directed, that I should be disposed to recognize its authority unless it had been expressly overruled and a different principle established. But, from an examination of all the authorities, I think I may safely add to the opinion expressed in *Blin v. Mayo*,<sup>1</sup> that the usage of business in the vicinity may be received to show when the liability of common carriers ceases, as well as when it commences.

It is to be observed that, from the case as presented, all we are called on to decide is that evidence of the usage of the defendants, and that known to the president and cashier of the bank, should have been received; and I have therefore spoken of this knowledge as important in the case. The court, however, are not called on to decide whether this knowledge is of any importance. If the evidence had been admitted, and it had fallen short of establishing the fact of personal knowledge in the plaintiffs, I am not prepared to say the defendants would have been liable. The court below told the counsel that although the defendants might be common carriers of ordinary goods, etc., yet it was not to be taken *prima facie* that they were carriers of packages of bank-bills, like the one in dispute, and in this they were undoubtedly correct. The same kind of evidence, then, which was used to charge them should have been received to show how far they held themselves out as carriers by the course of their business; and if, from the course of their business, they held themselves out as carriers of goods to be delivered at the wharfs where they stopped, or of money to be delivered to the person having the care of the wharf, or to any other person, it may be questioned whether the plaintiffs were not required to take notice of their usage in this particular, and also whether the very nature of the business of transporting by steamboats and railroad cars is not notice that they cannot either personally deliver to the consignees or the persons to whom a package of money is directed, or send word, or give notice to them of their arrival. Their stay at their stopping-place is so short that notice could not be conveyed to any person at any distance from the wharf or place of deposit; and unless they stipulate, either by special contract or general usage, that they will see that goods or money are

<sup>1</sup> 10 Vt. 56.

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personally delivered to the person to whom directed, or will give notice to him, it may be questioned whether the consignor must not provide for the further transmission of the goods or money after the boats, cars, or stages arrive at their stopping-place. The question, however, is not before us, and is not decided, as the case does not require it.

The evidence offered and rejected by the County Court should have been received, and their judgment is consequently reversed.

*Judgment reversed.*

[Same case, in the Supreme Court of Vermont, January Term, 1846.\*]

HON. CHARLES K. WILLIAMS, *Chief Justice.*

" ISAAC F. REDFIELD, }  
 " MILO L. BENNETT, } *Judges.*  
 " DANIEL KELLOGG, }

IN accordance with the opinion,<sup>1</sup> the case was again tried. Evidence of the usage of carriers to deliver packages of bank-bills intrusted to them to the wharfinger, on the wharf, was given, and also that this usage was known to Dr. Peck, president and a director of the bank. The defendants, among other things, requested the court to instruct the jury that if they found that the usage of the defendants above mentioned was known to the president of the bank, it was, in point of fact, notice to the bank. But upon this point the court instructed the jury that notice of the usage claimed might be express, or might be implied from the circumstances of the case, and that notice to the cashier of the bank, and also to the teller in this particular case, — as he was the agent to deliver the package of bills to the captain of the boat, — or to either of them, was a notice to the bank itself; but that if Dr. Peck, the president of the bank, had notice of such a usage as was claimed to exist, this was not of itself notice to the bank, simply because he was a director and president of the bank, but that such evidence was competent as tending to prove notice to the bank; and that if from this fact, and from the long continuance, notoriety, and uniformity of the usage, and from all the circumstances attending this case, they were satisfied that the board of directors, or a majority of them, had knowledge of the existence of such usage, this was sufficient to charge the bank with notice, and that it was immaterial whether such directors came to the knowledge of such usage when in session and acting as a board of directors, or upon other occasions and at other times. But the jury were told that if Dr. Peck had had the agency of

\* Reported 18 Vt. 131.

<sup>1</sup> *Ante*, p. 133.

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the affairs of the bank committed to him by the directors, and had been intrusted with the transmission of the money of the bank to one place and another, as occasion should require, then notice to him would of itself be notice to the bank.

The jury returned a verdict for the plaintiffs. Exceptions by defendants.

*C. Adams and D. A. Smalley*, for the defendants. — It was not material to the defence to show that the plaintiffs had knowledge of the custom and usage that had prevailed as to the manner of delivering packages of bills. If the receipt of the package implied an obligation to deliver at Plattsburgh, it must be, in the absence of an express contract, to deliver according to general custom or particular usage, and the plaintiffs were bound to take notice of such custom or usage.<sup>1</sup> But, if notice to the bank was necessary, we insist that the notice was sufficient.

*C. D. Kasson and Asabel Peck*, for the plaintiffs. — The charge of the court below as to what would constitute notice to the plaintiffs of the usage claimed by the defendants to exist, was correct.<sup>2</sup> The plaintiffs must have had knowledge of such usage in order to affect them by it. This was never doubted. Even in *Gibson v. Culver*,<sup>3</sup> *Blin v. Mayo*,<sup>4</sup> and this case when here before, such knowledge was the only ground upon which the courts held the usage admissible. It is only on the ground that the parties knew of the usage, and are therefore supposed to have contracted with reference to it, that it is ever admissible; and it is a matter of fact for the jury to find whether, in any given case, the parties in fact contracted with reference to it. This is so even with reference to general usages.<sup>5</sup> But in the case of a usage of the party, it was never pretended that it could avail anything unless it was known to the party to be charged therewith.<sup>6</sup> And the usage must also be to

<sup>1</sup> *S. c.* 16 Vt. 52; *Story on Bail*, §§ 533, 534; *Cole v. Epper v. Good*, 5 Car. & P. 380; *Barber v. Bruce*, 3 Conn. 9; *Crosby v. Fitch*, 12 Conn. 410; *Rushforth v. Hadfield*, 6 East, 519; *Kent v. Coughtry*, 11 Johns. 107; *Lethbridge's Case*, 2 Salk. 443; *Noble v. Kennoway*, 2 Doug. 510; *Vallance v. Dewar*, 1 Camp. 503; *Ongler v. Jennings*, 1 Camp. 505; *Colt v. Commercial Ins. Co.*, 7 Johns. 385; *Halsey v. Brown*, 3 Day, 346; *Sewall v. Allen*, 6 Wend. 331; *Story on Bail*, 539-541; *Gibson v. Culver*, 17 Wend. 305; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 389; *Cutley v. Wintringham*, *Peake N. P.* 150; *Wardell v. Mourillyan*, 1 Esp. 693; *Gatliffe v. Bourne*, 2 Moo. & R. 100; *Abb. on Ship*, 2 Kent's Comm. 604, 605; *Stephenson v. Hart*, 4 Bing. 476.

<sup>2</sup> *Hider v. Dowell*, 1 Taun. 383; *Cross v.*

*Smith*, 1 Mau. & Sel. 555; *Ang. & Ames on Corp.* 247-249; *Hayward v. Pilgrim Society*, 21 Pick. 277; *Washington Bank v. Lewis*, 22 Pick. 24; *Commercial Bank v. Cunningham*, 24 Pick. 276; *Housatonic, etc., Bank v. Martin*, 1 Mete. 308; *Fulton Bank v. Benedict*, 1 Hall, 495; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige, 136; *Hayden v. Middlesex Turnpike Co.*, 10 Mass. 403.

<sup>3</sup> 17 Wend. 305.

<sup>4</sup> 10 Vt. 56.

<sup>5</sup> *Rushforth v. Hadfield*, 7 East, 228; *Wood v. Hickok*, 2 Wend. 504.

<sup>6</sup> *Renner v. Bank*, 9 Wheat. 697; *Lincoln, etc., Bank v. Page*, 9 Mass. 157; *Eager v. Atlas Ins. Co.*, 14 Pick. 143; *Story on Bail*. 645.

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so deliver at the risk of the consignee.<sup>1</sup> A carrier whose liability is fixed by law cannot change the law by his own act.<sup>2</sup>

KELLOGG, J., delivered the opinion of the court.

The remaining questions in the case arise upon the instructions given by the court to the jury. The defendants were common carriers by steamboat upon Lake Champlain, and as such received the package of money for the loss of which this suit is brought. The case involves an inquiry as to the extent of the duty and liability of common carriers. And it has been urged in the argument that the defendants, having received the package directed to the cashier of the Clinton County Bank, at Plattsburgh, were bound to deliver it to the consignee, or at least to deliver it at a proper place and give notice thereof to the consignee, and that the usage and custom of the defendants to deliver packages of money to the wharfinger upon the wharf, in order to be available to the defendants by way of defence, must have been known to the plaintiff; and the court below, in their instructions to the jury, seem to have so considered the law. This, we think, was an incorrect view of the law as applicable to the case.

In the absence of any special contract between the parties in relation to the subject, the duty and liability of the defendants must be determined by the law applicable to carriers of this description. This liability may be modified by contract, by the general usage of the business, or by the defendants' particular usage. This was evidently the opinion of this court when the case at bar was before them on a former occasion. Indeed, the case was then opened upon the ground that the evidence of custom and usage offered by the defendants should have been received. It is true that upon that occasion the defendants offered to prove that the custom and usage upon which they relied were known to the plaintiffs, but it is very obvious that the learned judge who then delivered the opinion of the court did not consider it material that the usage or custom should be known to the plaintiffs. He says: "The court, however, are not called upon to decide whether this knowledge is of any importance. If the evidence had been admitted, and it had fallen short of establishing the fact of personal knowledge in the plaintiffs, I am not prepared to say that the defendants would be liable."

But, whatever may have heretofore been the views of the court upon this point, a majority are now of opinion that it is not necessary to prove that the plaintiff had personal knowledge of the usage in order

<sup>1</sup> Story on Bail., § 543.

<sup>2</sup> Allen v. Sewall, 2 Wend. 327; Dwight v. Brewster, 1 Pick. 60; St. John v. Van Sant-

voord, 25 Wend. 660; Ostrander v. Brown, 15 Johns. 39.

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to make it available to the defendants. The case of *Van Santvoord v. St. John*<sup>1</sup> has a direct bearing upon the case at bar. The doctrine of that case is, in substance, this: that where goods are delivered to a carrier, marked for a particular place, without any directions as to their transportation and delivery except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of such usage or not. With the reasoning and authority of that case we are well satisfied. It is founded in good sense and is sustainable upon principle.

The case at bar was put to the jury by the County Court upon the supposition that, in order to enable the defendants to avail themselves of the usage upon which they relied as a defence, the jury must find that the plaintiffs had knowledge of such usage. This, we think, was clearly erroneous, and for this error the judgment of the County Court is reversed.

BENNETT, J., dissenting.

*Judgment reversed.*

## 13. CORPORATIONS—USAGES CONTRARY TO CHARTER POWERS.

## BULKLEY v. DERBY FISHING COMPANY.\*

*In the Supreme Court of Errors of Connecticut, November, 1817.*

Hon. ZEPHANIAH SWIFT, *Chief Justice.*

" JOHN TRUMBULL,	} <i>Justices.</i>
" WILLIAM EDMOND,	
" NATHANIEL SMITH,	
" JEREMIAH GATES BRAINARD,	
" SIMEON BALDWIN,	
" CALVIN GODDARD,	
" STEPHEN TITUS HOSMER,	
" JAMES GOULD,	

A corporation may, by usage and practice, render itself liable on contracts executed in a different mode from that authorized in its charter.

ACTION on a policy of insurance upon a vessel. At the trial the plaintiffs offered in evidence the policy declared upon, signed "Canfield Gillett, president," and countersigned "Nathan Wheeler, assistant."

\* Reported 2 Conn. 252; 7 Am. Dec. 271.

<sup>1</sup> 6 Hill, 157.

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The defendants objected to the evidence because the policy did not appear to be countersigned by the secretary, as provided by the act authorizing the company to pursue the business of marine insurance. To obviate this objection the plaintiffs offered in evidence the correspondence between the insured and secretary of the company, and the registry of the policy by the secretary, to prove that the company had by its authorized officers ratified the policy; they also offered in evidence the book of records of policies of insurance kept by the company, to show that it had not been the practice for the secretary to countersign the policies, and that many policies had been issued countersigned by the assistant, like the one in suit. But, the defendants objecting, the court rejected the evidence so offered by the plaintiffs and directed the jury to find a verdict for the defendants, which they did. Motion for a new trial, the questions upon which were reserved for the advice of all the judges.

*Daggett and Staples*, for the plaintiffs, cited 2 *Bacon's Abridgment*,<sup>1</sup> *Danforth v. Schoharie and Duaneburgh Turnpike Road*,<sup>2</sup> *Spear v. Ladd*,<sup>3</sup> and *Hayden v. Middlesex Turnpike Company*.<sup>4</sup>

*N. Smith and Bristol*, for the defendants, cited *Heul v. Providence Insurance Company*<sup>5</sup> and *Beatty v. Marine Insurance Company*.<sup>6</sup>

SWIFT, C. J. — In the acts constituting banks and other corporations, regulations are made with regard to the mode in which they are to transact their business and render their engagements obligatory. To enable them to enforce the engagements made for their benefit, they must act within the scope of their authority and conformably to the directions of law.

In all cases where banks and similar corporations conform to their charter, their acts are binding on them. So, in cases where they do not conform literally to their charter, they may be liable. Suppose a banking corporation should by a vote agree to issue bills in a different form or with different signatures from those prescribed, they would by their own act be rendered liable to pay them. If such a corporation, without a vote, should introduce a usage and practice in the transaction of their business different from that prescribed by law, they would by the same reason be rendered liable; for, though such conduct might be improper in itself, yet the bank cannot take advantage of their own wrong to avoid their contracts. It cannot be supposed that, in general, those who dealt with them had knowledge of their deviation from the charter regu-

<sup>1</sup> Gwil. ed. 13.

<sup>2</sup> 12 Johns. 227.

<sup>3</sup> 11 Mass. 94.

<sup>4</sup> 10 Mass. 379; 6 Am. Dec. 143.

<sup>5</sup> 2 Cranch, 127.

<sup>6</sup> 2 Johns. 109; 3 Am. Dec. 401.

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lations; and it is to be presumed that they act according to law. If it be admitted that banks may thus deviate and then avoid their contracts, they would be enabled to practice the grossest frauds on the community, especially in a country where there is such an immense number of moneyed institutions as in this, and where it is practicable for a very few to know the extent of their powers and regulations. Banks, like individuals, must be liable in the character which they hold out to the world; and whatever may be the forms of their obligations, if they are according to their charter, their corporate votes, or their known usage and practice, they ought to be binding.

A corporate act is not required in all cases. It is sufficient if there be a usage and practice, under such circumstances as may be presumed to be within the general knowledge and by the consent of the company. Nor can the stockholders or members of the company be subjected to any inconvenience or damage. If any officer vested with certain powers should in any instance violate them, and attempt illegally to subject the corporation to any obligation, such corporation may, instantly on the discovery, disavow the act and prevent a repetition; and then, as there will be neither law nor usage to sanction the transaction, it will not be binding. But where the corporation will suffer such practice to continue, it is to be presumed that it is done with their consent, and be made obligatory on them. In the present case, it appears to me that the evidence offered conduced to prove that it was the usage and practice of this company to underwrite policies of insurance and draw bills of exchange in the form now under consideration, and, of course, that it ought to have been admitted. Whether the evidence offered would have been sufficient to have satisfied the jury of the fact, is not now the question. We have only to decide on the relevancy; the jury must decide on the sufficiency of the testimony.

I am of opinion that a new trial ought to be granted.

TRUMBULL, BRAINARD, and GODDARD, JJ., concurred in the opinion of the chief justice.

HOSMER, J., also advised a new trial, citing *Rex v. Bigg*,<sup>1</sup> in addition to the authorities mentioned by counsel as going "to the full length of deciding that, as against a corporation, an authority to its agent different from the prescriptions of its charter might be implied."

SMITH, J., did not agree with the chief justice on the ground taken by him, but acquiesced in the result on the ground that the secretary had, in his correspondence with the insured, agreed to the policy in question, and had afterwards registered the policy.

<sup>1</sup> 3 P. Wms. 419.



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GOULD, J., gave an opinion favoring a new trial, holding that, as against a corporation, the contract of an agent appointed beyond the authority of its charter may be binding, though it may be otherwise where the corporation itself claims a right under such contract, and cited *Ex parte Meymot*<sup>1</sup> as a case containing an analogous doctrine, where a clergyman, prohibited by statute<sup>2</sup> from trading, was nevertheless held liable for his contracts as a trader. He admitted it to be generally, though not universally true, that an aggregate corporation cannot confer express authority upon an agent except by deed, but held that an appointment might well be implied from usual and frequent practice, and that if an authority by deed were requisite, it would in such case be presumed to have been so given—citing *Mayor of Kingston upon Hull v. Horner*.<sup>3</sup> He thought, also, that a usage of a corporation in the transaction of business was to be proved by the acts of its officers or acknowledged agents in the management of its ordinary concerns, and that, unlike the case of a presumption of title arising from long-continued possession and enjoyment, such usage need not be ancient.

EDMOND, J., dissented.

BALDWIN, J., gave no opinion, being interested in the funds of the corporation defendant.

*New trial to be granted.*

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 14. FIRE INSURANCE—CUSTOMARY USE OF PROHIBITED ARTICLES.

## HARPER v. CITY INSURANCE COMPANY.\*

*In the Supreme Court of New York, July, 1857.*

HON. JOHN DUER, Chief Justice.

" JOSEPH S. BOSWORTH,	} Justices.
" MURRAY HOFFMAN,	
" JOHN SLOSSON,	
" LEWIS B. WOODRUFF,	

In a policy of fire insurance upon printing and book materials in a building, privileged for a printing-office and bindery, there was a condition exempting the insurer from liability for any loss occasioned by camphene. The property insured was destroyed by a fire caused by a workman accidentally dropping a lighted paper into an open jar of camphene, which was kept in the building for use in the business. In an action on the policy, the jury having found that when the policy was effected it was the general and

\* Reported 1 Bosw. 520.

<sup>1</sup> 1 Atk. 193.

<sup>2</sup> 21 Hen. VIII.

Cowp. 102.

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established custom among printers to use camphene in the printing of books, and that its use was not only advantageous, but necessary: *held*, that the exemption extended only to a loss occasioned by the use of camphene for purposes other than that of printing.

THE questions decided in this action arise on a verdict for the plaintiffs, taken subject to the opinion of the court at General Term on the exceptions taken on the trial.

The action was brought to recover a total loss under a policy of insurance against fire, issued by the defendants, and dated the 3d of March, 1853. By the terms of the policy, the defendants insured the plaintiffs against loss or damage by fire to the amount of \$10,000 on their printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine, contained in certain brick buildings, particularly described in the policy, with the privilege "for a printing-office, bindery, books-store, and steam-boiler in the yard."

The defence was that the fire was occasioned by camphene, in violation of the conditions of the policy and of the rights of the defendants. The eighth condition of the policy, to which the defence refers, declares, among other things, that the company shall not be liable for loss or damage by fire "occasioned by camphene or other inflammable liquid."

The cause was tried before Mr. Justice DUER and a jury, in January, 1855. The defendants' counsel admitted the execution and delivery of the policy, and of the preliminary proofs, the fire, the plaintiffs' ownership of the goods insured, their destruction by the fire, and that the loss exceeded the amount insured.

It was proved that the fire was caused by the accidental ignition of a quantity of camphene, kept in the plaintiffs' printing-office in a large and open sheet-iron pan, in which the rollers used for fine printing were cleaned. A number of witnesses were examined on the part of the plaintiffs to prove that this use of camphene was general among printers, and was not merely advantageous, but, for fine work, absolutely necessary.

When the plaintiffs rested, the defendants' counsel moved for a nonsuit, substantially on the grounds stated in his points on the argument at General Term. The motion was denied, and the counsel excepted.

Several witnesses were examined for the defendants to repel the testimony on the part of the plaintiffs.

When the testimony was closed and the counsel had summed up, the judge submitted to the jury the following questions:—

*First.* Was there a general and established usage among printers in the use of camphene for fine work in the printing of books, at the time this policy was effected?

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*Second.* Was the use of camphene necessary for fine work in the printing of books?

*Third.* If not necessary, was its use more advantageous than that of any other article for the purposes for which it is proved to have been used?

And he then charged the jury that if they answered either of the questions in the affirmative, they should find a verdict for the plaintiffs for the amount of the policy. The counsel for the defendants excepted to the charge.

The jury answered all the above questions in the affirmative, and rendered a verdict for plaintiffs for \$11,278.76.

*William M. Evarts*, in moving for judgment for the plaintiffs upon the verdict, made and argued the following points: 1. Under the finding of the jury as to the necessary use of camphene in the printing of books and the general established usage of the trade so to employ that article, it is impossible to contend that its use by the plaintiffs, as proved, was not within the special description of the subject insured and the special privilege accorded by the policy. 2. It is equally clear that the disclosure of the subject and object of the insurance, as recited in the policy, repels any suggestion of concealment of the element of risk supposed to arise from this use of camphene in printing. This notice of the subject of insurance, and of the purposes for which the premises in which it was situated were privileged, either gave the company actual information of all the elements of risk involved, or put them upon inquiry. 3. If, then, the general conditions of the policy be construed as a warranty by the assured against the use of camphene, the particular use within the description and the privilege of the subject insured is allowed by the special terms of the contract.<sup>1</sup> 4. The only remaining question is whether, though the use of camphene in printing be allowed by the policy, the manner of the loss exempts the defendants from liability as not being a risk insured against. 5. The property insured was destroyed by fire; fire was the proximate cause and the exclusive agent of its destruction; destruction by fire was the risk insured against. 6. The originating and responsible cause to which the destruction by fire is traceable is the careless, yet purely casual communication of an ignited material to camphene, as in use within the privilege of the policy, such camphene being a part of the subject insured against fire. The ignition was independent of the camphene in its origin; that its spread on the subjects insured was through the inflammability of camphene, which formed an incorporate part of the subjects insured, does not make the camphene the occasion of the loss.

<sup>1</sup> Wall v. Howard Ins. Co., 14 Barb. 383; Bryant v. Poughkeepsie Ins. Co., 21 Barb. 151.

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Camphene can, within the meaning of the policy, be regarded as occasioning a loss by fire only when it occasions the original ignition by its inflammable nature, or, at the furthest, when its use becomes the means whereby the proper and ordinary use of light and fire in the premises is inflamed into a destructive combustion occasioning the loss. Camphene cannot be regarded as occasioning a loss by fire merely because the ignition reaching it becomes less controllable than before; this would be equivalent to a repudiation of loss where camphene was used, although its use was licensed and it was itself insured. 7. The true construction of the clause in regard to loss occasioned by camphene in connection with the special subject insured, which includes camphene, and the special privilege accorded, which involves the use of camphene, is that a loss occasioned by camphene in a relation or use outside of the description and privilege is excluded from the risks assumed.

A. K. Hadley, for the defendants, made and argued the following points: 1. The fire and consequent loss were occasioned by camphene, and, therefore, within the express exception contained in the eighth condition annexed to and forming part of the policy.<sup>1</sup> It is lawful and proper in itself, and binding and conclusive upon the plaintiffs; and this, notwithstanding the defendants may have known and assented to the use of camphene.<sup>2</sup> It was clearly competent for the defendants to authorize the use of camphene, and yet screen themselves from any liability on account of loss occasioned by it. They also expressly authorized the use of a "steam-boiler in the yard," and yet provided that "this company will not be liable for any loss, by fire or otherwise, occasioned by the explosion of a steam-boiler;" and this last condition the Court of Appeals, as well as this court, has already held to be valid and conclusive upon the plaintiffs in the case of *St. John v. American Mutual Fire and Marine Insurance Company*.<sup>3</sup> 2. All testimony tending to show the usage of printers and the necessity or utility of camphene was incompetent, and improperly received. First, the contract being free from ambiguity, no such usage, necessity, or utility could have any effect to change its purport or effect.<sup>4</sup> Second, the usage of the trade in this particular was not brought home to the knowledge of the defendants; neither was it so general, so well settled, so uniformly acted on, or of so long continuance, as to raise any presumption of such knowledge, or that the contract was made with reference to it.<sup>5</sup>

<sup>1</sup> *Jennings v. Chenango County Ins. Co.*, 2 Denio, 78; *Murdock v. Chenango County Ins. Co.*, 2 N. Y. 220.

<sup>2</sup> *St. John v. American Mutual Fire & Marine Ins. Co.*, 1 Duer, 371; 11 N. Y. 516.

<sup>3</sup> *Supra*.

<sup>4</sup> *Cow. & Hill's Notes*, 1396, 1397, 1416, 1463.

<sup>5</sup> *Id.* 1412, 1417.

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By the Court, SLOSSON, J. — It is difficult to distinguish this case from that of *St. John v. American Mutual Fire and Marine Insurance Company*,<sup>1</sup> and unless the privilege contained in the policy, taken in connection with the general nature of the subject insured, — to wit, a printing and book establishment, — creates a distinction between the two, that case must be decisive of this.

The defence mainly relied upon is that the fire was "occasioned by camphene," a risk from which, by the eighth printed condition of the policy, the company is expressly exempted.

The conditions of the policy are, by express reference to them in the body of the instrument, made part of the contract, and it is provided in terms that they "are to be used and resorted to in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for."

The camphene was kept in open sheet-iron jars or pans in two rooms, one on the second and one on the third floors, expressly fitted up and arranged, and supposed to be sufficiently so to prevent any dangerous communication between them and other parts of the building, in case of accident in the use of the article. These jars or pans were stationary. They were nearly four feet long, and the fluid was put into them to the depth of from two to two and a half feet; they were used for dipping the rollers used in printing, for the purpose of cleaning them. The fire was communicated to the camphene by one of the workmen accidentally or carelessly dropping or throwing a lighted paper or match into one of the open jars. The fire spread with immediate and fatal rapidity, and the whole building, with almost its entire contents, was destroyed, producing an immense loss. The insurance was for \$10,000 on the plaintiffs' "printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery contained in the premises in Cliff and Pearl Streets." The privilege was thus expressed: "Privilege for a printing-office, bindery, and book-store, and steam-boiler in the yard."

The judge at the trial admitted, under objection, evidence of a usage among printers to use camphene for fine work in the printing of books, and of the necessity and advantage of its use.

It appears from the evidence that the article was used by printers in cleaning rollers, wood-cuts, metal plates, and type-metal where there are engravings. Most of the witnesses speak of it as a necessary article in what is called fine work. Some of the witnesses speak of its having been in use five years; some, six or seven; some, eight or ten; and one, that it

<sup>1</sup> 1 Duer, 371 (affirmed 11 N. Y. 516).

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has been in use fourteen years. One witness says its use has been general in all printing-offices for nine or ten years; another says he knows of no printers who do fine work who do not use camphene; another, however, says that he cannot say that a majority of printers use it, and thinks not; another, that it is generally used by those who do fine work. The plaintiffs themselves had used it for fourteen years.

The importance of establishing a usage in the use of camphene arises both from the absence of any evidence to show that when the plaintiffs applied for the insurance they made known to the defendants that the article was used on the premises, as they were bound to have done, it being an article materially affecting the risk, and the omission of all reference to it by name in the privilege, which, it is contended, includes its use.

The judge submitted three distinct questions to the jury: —

*First.* Was there a general and established usage among printers in the use of camphene for fine work in the printing of books at the time the policy was effected?

*Second.* Was camphene necessary for fine work in the printing of books?

*Third.* If not necessary, was its use more advantageous than that of any other article for the purposes for which it is proved to have been used?

And the jury were instructed that if they found either in the affirmative, they should find a verdict for the plaintiffs for the amount of the policy. The jury answered each question in the affirmative, and a verdict was taken for the plaintiffs, subject to the opinion of the court at General Term.

The question of how long the usage, if the jury should find it to exist, had prevailed, was not submitted to them. They have found that the usage prevailed, and that the use of the article was both necessary and more advantageous than that of any other for the purpose for which it was used in printing. As the jury found all the questions in the affirmative, no question can arise as to which of the three formed the basis of the verdict. It rests upon all; and if the charge of the judge contained a correct exposition of the law of the contract between the parties, the verdict must stand, unless the omission to find how long the custom to use camphene had prevailed shall be considered fatal, or unless evidence of usage was inadmissible at all.

I am of opinion, considering the generality of the language employed in the clause containing the privilege, that the evidence was properly admitted, and I think the finding that there was a general and established

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usage among printers to use camphene, especially under the evidence which shows it to have existed several years at the least, quite enough, without a special finding as to the length of time it has prevailed, to charge the defendants with knowledge of its existence.

The judge charged, "that, under the description of the subjects insured and the privilege granted therewith, the plaintiffs are entitled to recover, although the accidental fire may have been communicated to or propagated through the camphene used and employed by the plaintiffs in their business, within the description and privilege of the policy, if the jury should be of opinion that camphene is an article of usual, necessary, or advantageous use in such, the business of the plaintiffs, within the description and privilege of the policy."

It is important here to determine what is meant by the words "occasioned by camphene," as used in the eighth condition; for if they are to be construed in the sense of originating or causing of itself a fire, the condition becomes practically a dead letter.

The liquid itself can never physically originate fire—it is not self-combustible; it can only occasion fire by being the immediate medium of its communication to other subjects. It is in this sense, therefore, that the words are to be understood; and, thus read, the plain meaning of the condition is, that the company will not be responsible for a loss by fire which shall have been occasioned by means of camphene as a medium of its communication, and which would not have happened but for the presence of that article on the premises. The language of the charge, in which the fire is spoken of as "communicated to or propagated through the camphene," therefore, correctly defines the meaning of the words in the condition, "occasioned by."

The question then is whether, under the privilege contained in the policy,—"privilege for a printing-office, bindery, and book-store,"—taken in connection with the subject insured,—"printing and book materials, stock, paper, stereotype-plates, fixtures, printed books, and steam-engines and machinery contained in, etc.,"—the defendants, with knowledge at the time of effecting the insurance that camphene was used in the process of printing, agreed to assume the risk of a fire "occasioned by camphene," against which they have expressly stipulated in the eighth condition of the policy; in other words, whether the privilege does not supersede the condition.

There are two aspects in which this question is to be considered, and in which it was argued, both depending upon the proper construction of the terms of the policy.

The first is that contended for by the plaintiffs, to wit: that by per-



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mitting the business of a "printing-office" to be carried on upon the premises, for the purposes of which the use of camphene was necessary, and advantageous, and known to the defendants to be usual and customary, they thereby, and by force of such privilege or permission, assumed, and must be held in law to have assumed, the risk of a loss by fire through the medium of that article, notwithstanding they are by the eighth condition of the policy in terms exempted from that risk.

The other is that contended for by the defendants, to wit: that in giving the privilege they have assented to the use of camphene to this extent and in this sense only, to wit: that its use on the premises in the business of printing, though in itself an article of extra-hazardous character, shall not, under other provisions of the policy, avoid the contract, but that they do not thereby intend, nor upon a proper construction of the contract can be held to have intended, to waive the benefit of the condition which exempts them from a loss occasioned through its medium. In other words, that while they permit its use, and agree to waive any forfeiture by reason of such use, they nevertheless will not be responsible for a loss occasioned by such use.

The question is one by no means of easy solution, nor is it perhaps going too far to say that its decision either way will still leave some embarrassment and doubt on the mind. There are considerations which make the views entertained by the defendants extremely cogent and difficult to answer; while, on the other hand, the construction given to the contract by the plaintiffs is, to say the least, of equal plausibility and force.

It must be borne in mind that the privilege is contained in a special written clause, while the exemption is in one of the usual printed conditions.

That every stipulation in a contract should be so construed as to give it some practical operation, is a conceded rule; and it is equally true that all the stipulations in the contract must be so construed as to harmonize, if possible.

The office of a privilege in a policy is to authorize the use of an article or an occupation on the premises which but for such license would avoid the contract. As in the present case, the business of book-printing is one of the trades included in the memorandum of special rates, and to carry it on upon the premises without a special authority would have avoided the policy.

In the license or privilege of carrying on a particular business or trade on the premises — as, in this instance, that of a printing-office — must properly be included all that is necessary, essential, and cus-

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tomary in the conduct of such business. If this be so, then the use of camphene in printing is by necessary implication allowed in the privilege to print; but, conceding this, the question remains, Shall the company be bound for a loss by fire occasioned by that article?

The defendants contend that by holding them exempt from liability for loss while the privilege to use is conceded, both provisions or stipulations are fully answered, and each party obtains what he stipulated for: the plaintiffs, a right to use an article which without the privilege would have avoided their contract altogether; while the defendants, thus waiving the use as a ground of forfeiture, nevertheless are relieved from liability in respect to that particular article—thus sustaining in full force the terms and stipulations of the eighth condition.

On the other hand, the plaintiffs say that this construction is to make the privilege in a measure nugatory, and that by giving the privilege, the company, upon every principle of sound sense and fair interpretation, assume the whole risk incident to the customary and proper use of the article; and it is contended that this construction does not altogether dispense with the eighth condition, whose requirements, it is said, are met by confining the exemption contained therein to “a loss occasioned by camphene in a relation or use outside of the privilege.”

This latter view of the question, it seems to us, after a careful consideration of the whole subject, is the true one. If the privilege is to be construed by the usage at all, and the usage be a reasonable use, it is to the extent of such usage a limitation of, or exception from the stipulations of the condition. So, also, if the privilege is to be construed in reference to what are the necessary means of securing its enjoyment, as it unquestionably must be, then it embraces all the means necessary to the business of printing, and to the full extent of such necessity is a limitation of, or exception from the terms of the condition. The condition is not, however, left a dead letter in the contract, for the moment the point of usage or necessity is passed it becomes as operative as ever. It therefore stands for every purpose not specially excepted by the privilege. This construction seems to us both reasonable and just, and the only one by which effectual justice will be secured.

It is contended by the defendants that, however the use of camphene in small quantities may be fairly held to be within the privilege, its use to the extent shown in the present case cannot reasonably be held to have been within the contemplation of the parties at the time of underwriting this policy, and that therefore the exemption covenanted in the condition remains in full force.

This was made a point on the motion for a nonsuit, and it was contended that such a use of the article was “not in accordance with any

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known custom or usage, with notice of which the defendants were presumed to be cognizant or chargeable, and was a fact and feature in the risk which increased its hazard." This mode of using camphene is not, according to the evidence, confined to the plaintiffs. Williams, a printer in the Methodist Book Concern, says they use it in that establishment as the plaintiffs do, to wit: "immerge the plates and rollers in tubs containing the article;" and Brown, the superintendent of the printing department in the American Tract Society, says that rollers are used in all printing-offices.

It is a fair inference, from this evidence, that this mode of using camphene is a part of the general usage or custom; and if so, it was equally within the knowledge of the defendants as the fact of its use at all. It, therefore, was unnecessary to have made a special explanation in respect to it on applying for the insurance; and if the use of the article at all was within the privilege by reason of the usage, as we have shown it was, its use in this particular mode was equally so.

Nor does it follow that the privilege, if extended thus far, is necessarily unlimited; any abuse of it would clearly defeat a recovery. Like all other stipulations in a contract, it must not only be reasonably construed, but acted upon in good faith. The evidence does not show that more of the article was used in the present instance than was absolutely necessary for the purpose of the printing authorized by the privilege; and it would be hard to say, if not difficult to comprehend, that though the use of it in a smaller quantity might have been embraced within the privilege, its use in quantities adequate to the necessities of so large an establishment as the plaintiffs' was not so embraced. The answer would be obvious: that the magnitude of the risks assumed was in proportion to the magnitude of the subject the defendants had undertaken to insure.

There must be judgment for the plaintiffs for the amount of the verdict, and interest.

*Judgment for the plaintiffs.*

[Same case, on appeal, in the Court of Appeals of New York, December, 1860.\*]

Hon. GEORGE F. COMSTOCK, *Chief Judge.*

" HIRAM DENIO,	} <i>Judges.</i>
" HENRY E. DAVIES,	
" SAMUEL L. SELDEN,	
" THOMAS W. CLERKE,	
" WILLIAM B. WRIGHT,	
" WILLIAM J. BACON,	
" HENRY WELLES,	

\* Reported 22 N. Y. 441.

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APPEAL from the Superior Court of the City of New York.

Action upon a policy of fire insurance on the plaintiff's "printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery contained in [certain described premises], and privileged for a printing-office, bindery, and book-store." The policy provided, in its printed conditions, that if the premises should be used for carrying on any business denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates, or for storing articles in either of those categories, without a special agreement in the policy therefor, so long as such use should continue, the policy should be of no force. "Stocks of booksellers" and "printers of books" were specified under the head of extra-hazardous, and the business of "printers of books" in the memorandum of special rates. Upon the trial, it was proved that the plaintiffs' establishment was the most extensive for the printing of books in the country; and the jury found specifically, in answer to interrogatories, that the use of camphene was general among printers for fine work in the printing of books, for cleaning ink-rollers, washing stereotype plates, etc., and that such use was not only more advantageous than that of any other article, but necessary. The fire was occasioned by a workman throwing a lighted match into a pan upon the floor, containing camphene. There was a verdict for the plaintiffs, subject to the opinion of the court; and judgment having been rendered thereon at General Term, the defendants appealed to this court.

*John H. Reynolds*, for the appellant; *William M. Evarts*, for the respondents.

COMSTOCK, C. J. — The jury found, in answer to interrogatories specially submitted to them, that the use of camphene in the manner proved was according to a general and established usage in the printing and book business as carried on by the plaintiffs, and that such use was necessary in that business. In the written part of the policy the subject of insurance is described as the plaintiffs' printing and book materials, stock, etc., "privileged for a printing-office, bindery, etc." The language is identical with that contained in the policy which was before us in the case of *Harper v. Albany Insurance Company*.<sup>1</sup> We there held, for reasons which need not be repeated, that the insurers were liable for a loss occasioned by the necessary and customary use of camphene in the plaintiffs' business, although the use of that article was prohibited in general terms in the printed conditions annexed to and forming a part of the contract. In that case, the printed form of the policy, if con-

<sup>1</sup> 17 N. Y. 194.

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strued without reference to the subject of insurance as described in the written part, proscribed the use or presence of camphene for any purpose. In this case, the printed condition declares in substance that if the article is used, and a loss is occasioned thereby, the insurer will not be liable. There is no other distinction between the two cases.

And this distinction is not one of principle. In the case cited we found no irreconcilable repugnancy between the written and printed clauses of the contract. If such a repugnancy had been discovered, then, as the court said, the printed form must yield to the more careful and deliberate written language of the parties in describing the subject of insurance at the very moment when the policy was issued. But it was considered that each clause might take effect. By insuring the plaintiffs' stock, with the privilege of a printing-office and book-bindery, the use of such materials, including camphene, as were necessary in that business was allowed; otherwise the contract was a mere delusion. But the restraining clause might nevertheless have its full effect upon the use of camphene for the purposes of light, and for all purposes beyond its necessary connection with the stock and business insured. So, in this case camphene must be considered as a part of the stock insured. Its continued presence and use were allowed, because the business which required its use was expressly privileged. The printed condition exempting the underwriters from loss when occasioned by this article should therefore be construed as referring to uses not within the privilege thus granted; otherwise, the two parts of the contract are repugnant to each other, and the printed form must yield to the deliberate written expression. An insurance upon the plaintiffs' stock and business, to be of no effect if a loss should be occasioned by the combustion of an article constituting a part of that stock and necessarily used in the business would, I think, be an anomalous undertaking. Undoubtedly, such a contract might be made. A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while at the same time it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. Where camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken that effect should be given to the policy accordingly, unless a different intention is very plainly declared. And such intention, instead of being hid away in printed forms remote from the principal contract, ought to be found in the deliberate expressions which are made use of at the time when the contract is entered

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into. Without doubt, all the printed conditions and specifications annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practised by the underwriter, and upon or within those forms the parties to each policy actually issued write their own particular intention. The plain meaning of the written part should therefore prevail, and other clauses must yield, if repugnant, or they must be construed so as to avoid a conflict of intentions. In this case, I think the perils of keeping and using camphene were insured against, so far as the keeping or use of it was permitted at all, and that the clause which exempts the insurer from liability should be understood as applying to the presence of the article under other conditions.

The judgment should be affirmed.

DAVIES, WRIGHT, BRECK, and WELLES, JJ., concurred; SELDEN, DENIO, and CLERKE, JJ., dissented.

*Judgment affirmed.*

## 15. MARINE INSURANCE—USAGE MAY EXCUSE A DEVIATION.

## WALSH v. HOMER.\*

*In the Supreme Court of Missouri, March Term, 1846.*

HON. WILLIAM B. NAPTON,	} Judges.
" WILLIAM SCOTT,	
" PREISTLY H. MCBRIDE,	

Evidence that it is the usage of the carrying trade for one boat on a voyage to stop and aid another boat in distress, is competent to show that such is not a deviation.

APPEAL from the St. Louis Circuit Court.

*Gamble & Bates*, for the appellants; *Geyer & Spaulding*, for the appellee.

SCOTT, J., delivered the opinion of the court.

This was an action on the case, brought in the St. Louis Circuit Court by the appellee, as surviving partner of the firm of J. & T. J. Homer, against the appellants, as owners of the steamboat *Rolla*, to recover for the loss of certain goods shipped on board that boat at New Orleans. The verdict and judgment were in favor of the plaintiff below, and the cause is brought into this court by appeal.

The first count of the declaration sets forth a policy of insurance on goods of the plaintiff made by the St. Louis Perpetual Insurance Company, and alleged that goods covered by the policy were shipped on



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board the Rolla, of which the defendants were the owners, at New Orleans, to be transported to St. Louis; that during the voyage the master of the Rolla deviated, etc., and detained and employed the boat, with the goods of the plaintiff on board, in relieving the steamboat George Collier, which was aground in the Mississippi, and in transporting goods from the Collier to the shore, no life being in danger; and that although the Rolla did, after such detention, etc., proceed on the voyage with the goods on board, yet the said steamboat Rolla, with the said goods and merchandise, by reason of the said defendants, their servants, and agents in that behalf, not proceeding therewith from New Orleans aforesaid to St. Louis aforesaid as soon as they were reasonably able, by and according to the direct, usual, and customary way and passage, but, on the contrary thereof, deviating, departing, touching, or remaining, continuing, and being delayed as in that behalf aforesaid, and before her arrival at St. Louis aforesaid, at the county aforesaid, was exposed to and assailed by storms and other perils on the Mississippi near a certain island called Island No. 21, and then and there was run and driven on a snag or other hard substance, and was wrecked, shattered, and broken, by means whereof the same goods, etc., of plaintiff on board said boat were wetted, damaged, spoiled, and sunk, and wholly lost to the plaintiff, and by reason of said deviation, departure, detention, and stoppage of the said steamboat Rolla, with the said goods, etc., on board, by the defendants, their servants, and agents, as in that behalf aforesaid, the said insurers in the said policy of insurance mentioned became and were discharged from all liability for or on account of the said damage and loss, or any part thereof.

The second and third counts are, in substance, the same as the first. The fourth count is in the ordinary form against carriers for the loss of goods, averring that the defendants did not safely and securely carry and deliver the goods according to their undertaking, but, on the contrary, so improperly behaved and conducted themselves with respect to said goods, that by and through the mere negligence, misconduct, and default of the defendants, their servants, and agents, the goods were lost.

The defendants pleaded not guilty. At the trial, the plaintiff gave in evidence the policy of insurance and the indorsements thereon, and offered evidence conducing to prove the shipment of goods covered by that policy on board the Rolla, at the time and for the voyage mentioned. Parts of the evidence on this point were objected to, but the objections were overruled. That George Taylor was the master, and the defendants owners of the boat; that, on the progress of the voyage, the Rolla



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was detained and employed in relieving the Collier, then aground, by transporting goods from that vessel to the shore, and in attempting to pull her off the bar by the power of the Rolla; that the Rolla afterwards proceeded on the voyage, and was wrecked as alleged, and the goods of the plaintiff lost.

Witnesses testified that from the commencement of steam navigation on the Western waters it had been the uniform usage and custom of all boats, when meeting another boat aground, to afford any assistance in their power; and although it was the uniform practice to charge for such service, yet no stipulation for such compensation was made before furnishing the aid required. This usage was generally known to merchants and insurers.

It was proved that after the opinion of this court in the case of *Settle v. St. Louis Perpetual Insurance Company*,<sup>1</sup> the different insurance companies at St. Louis inserted in their policies a clause to the effect that in case of loss after deviation to give succor to a vessel in distress, the loss should be paid, notwithstanding the deviation, "upon the assured assigning to the company all claims he or they may have against the owners of such steamboat in consequence of such deviation, and authorizing the company to use his name to enforce such claim for the benefit of the company."

The plaintiff moved the court to give to the jury the following instructions, which were given, to which the defendants excepted, viz.: "If the jury find that goods of the plaintiff covered by the policy in the declaration mentioned were shipped on board the steamboat Rolla at New Orleans, to be carried to the port of St. Louis; that said boat departed from New Orleans on said voyage with the said goods on board, and that during the voyage said steamboat Rolla, with said goods on board, was stopped and detained, without the consent of the plaintiff, for the purpose of assisting the steamboat George Collier, then aground in the Mississippi River, and that the Rolla was there used and employed in transporting cargo from the Collier to the shore, and in attempting to draw the said Collier into deeper water, such detention and employment was a deviation which discharged the underwriters from any subsequent loss of said goods on board the Rolla during that voyage.

"If the jury find from the evidence that goods of the plaintiff covered by the policy in the declaration mentioned were shipped on board the steamboat Rolla at New Orleans, to be carried to St. Louis; that said goods, during the voyage, were lost by a peril insured against, and that the underwriters were discharged from liability for such loss by

<sup>1</sup> 7 Mo. 379.

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reason of the previous deviation of said boat by the voluntary act of the master, then the owners of the Rolla are liable for such loss."

The defendants then asked the following instructions, which were refused, to which an exception was taken, viz. : —

"That the jury must find for the defendants on the three first counts in the declaration, unless they find from the evidence that the loss of the goods and merchandise in those counts mentioned was actually occasioned by the alleged deviation from the usual course of the voyage in said counts mentioned, respectively.

"The plaintiff cannot recover on the first count in his declaration for the loss of the goods therein mentioned, unless it appears to the satisfaction of the jury, from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That the plaintiff cannot recover on the second count of his declaration for the loss of the goods therein mentioned, unless it appears to the satisfaction of the jury, from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That the plaintiff cannot recover on the third count of his declaration for the loss of the goods therein mentioned, unless it appears to the satisfaction of the jury, from the evidence, that the sinking of the steamboat Rolla was occasioned by the alleged deviation in that count mentioned.

"That if the jury find from the evidence that at the time of the loss of the Rolla there was, and for many years previous had been, a custom and usage in the navigation of the Mississippi River for steamboats navigating said river to stop in their voyage and furnish assistance to other steamboats aground in said river and in distress, and that such custom and usage was general, and generally known to merchants, owners of boats, and insurers concerned in the navigation of said river, and that the captain and crew of the steamboat Rolla, in the alleged deviation to succor the steamboat George Collier, aground in the Mississippi, did no act and suffered no detention of said steamboat Rolla beyond or out of the said custom and usage, then the defendants are not responsible for any act of the said captain or crew which is within said custom or usage."

The principal question in this cause was before this court in the case of *Settle v. St. Louis Perpetual Insurance Company*.<sup>1</sup> In that suit, the policy of insurance was executed by the same company, the shipment

<sup>1</sup> 7 Mo. 379.

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was for the same voyage, on the same vessel, and the loss by the same disaster as is alleged by the declaration in this case. In the above-mentioned cause the point most debated was whether the detention of a vessel in the navigation of the Mississippi for the purpose of succoring another vessel in distress, when no life was in danger, was a deviation or not. Except in the case mentioned, it does not appear that this question has come up for adjudication. Eminent judges and elementary writers, influenced by the benevolence and humanity of our law, have not hesitated to declare that a detention on a voyage at sea to relieve a vessel in distress is not an act which would discharge the underwriters to a policy of insurance from the liability to the assured, in the event of a loss of the vessel affording the succor. Some have said that a deviation to save life or to succor persons in distress was allowable, but that a deviation for the purpose of saving property would discharge the underwriters. On our rivers, boats may be in danger when the lives of the crew and passengers are entirely safe, but in ocean navigation a vessel can scarcely be in distress unless the lives of those on board are at the same time endangered. Hence the language of the books, that a detention to succor vessels in distress is not a deviation that would discharge the underwriters. Judge SPRAGUE, who maintained the doctrine that a stoppage to succor vessels in distress is not a deviation which would discharge the policy, yet holds that, under the pretence of succoring distress, it was not allowable to become wreckers at the risk of the insurer. So Judge WASHINGTON<sup>1</sup> says: "The general definition of deviation is a voluntary departure from the course of the voyage insured, without necessity or reasonable cause, and I recollect no case where the justification is not essentially connected with the motive of safety to the property insured. If the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the general rule."

In the case of *Settle v. St. Louis Perpetual Insurance Company* it was admitted that no life was in danger, and of the two questions in that case, — whether a detention to relieve vessels in distress when no life was in danger would discharge a policy, and whether there was a usage in the inland navigation of our rivers which would justify a deviation for such a purpose, — the first was most elaborately argued at the bar, and it did appear that it was a turning-point of the cause. I am not prepared to say that the conclusion to which this court arrived on the former of these questions was erroneous.

In adopting the form of the policies used in marine insurance, it must

<sup>1</sup> Bond v. The Cora, 2 Wash. C. Ct. 84.

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have been understood that they should receive their long-accustomed interpretation. No case, I imagine, can be found in the law of marine insurance in which it was held that a deviation to assist a vessel as little exposed as the Collier was a justifiable deviation. Contracts of insurance are said to be *verri male fidei*. The vessel and cargo are in the possession and under the control of persons who, relying on the policy for an indemnity against losses, are stimulated to acts which the dictates of self-interest would effectually restrain, while those who are mostly interested in their preservation, and are liable to make good any losses that may occur, are at a great distance. Any latitude of discretion allowed to masters of vessels under such circumstances would lead to the grossest frauds on underwriters. The reasons which govern in moulding the law in relation to the responsibility of common carriers lie at the foundation of the rule prescribing the duties of the masters of vessels in respect to those who have made themselves responsible for their loss by insurance. The law fixing the responsibility of common carriers is, as Lord Holt observes, "a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealing with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered; and this is the reason the law is founded upon in that point." The law requires that a voyage should be performed with all practicable, safe, and convenient expedition. The impossibility, in many cases, of determining whether a subsequent loss has been caused by a previous detention is the reason that vessels insured are not permitted, at the risk of the insurer, to stop on their voyages, unless in cases of necessity. A very short detention may be the cause of loss of a vessel, and yet the keenest attention will not be able to detect and expose the train of incidents which connect the two events. Hence it has always been settled that a departure from the usual course of a voyage, or a detention during it, without necessity or justifiable cause, was an act which would discharge the underwriters in the event of a subsequent loss. By the terms of the contract, the insurer only runs the risk of the voyage agreed upon, and no other. It is a condition implied in the policy that the ship shall proceed to her port of destination by the shortest and safest course, and with all practicable, safe, and convenient expedition; and if the assured deviated or stopped on the voyage without necessity or a justifiable cause, it is a breach of the implied warranty, the effect of which is to discharge

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the underwriters from all subsequent responsibility, not because the risk is thereby increased, but because the insured had, without necessity, substituted another voyage for that which was insured, and thereby varied it. By the contract, the voyage is to be performed with all practicable speed. After a detention, the vessel at any time during her subsequent voyage is at a different place from that at which she would have been had it not been for the detention. Had she been at the place where a speedy voyage would have taken her, the combination of circumstances which occasioned the loss might not have taken place. The agency this circumstance had in producing the event may be unknown, and as the master cannot show that it had none, there is no hardship in making him suffer the consequence, as his unjustifiable act may have been the cause of it.

The foregoing principles are applicable to insurances on voyages exempt from the control of any custom or usage; but the courts all concur in the opinion that when the insurance is described to be on a particular voyage, the meaning of this description, as well as the language used by the parties in other parts of the policy, must be ascertained by its general acceptance and the common usage. The meaning of the parties is to be presumed to be that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most expeditious manner, as far as is consistent with safety; and if there be any departure from such course or mode of conducting the adventure whereby the risks insured against are varied or increased, it behooves the assured to justify such departure by showing a usage in that respect, or a reasonable necessity for it.<sup>1</sup> Chancellor KENT remarks that one cause of litigation in the courts on the subject of deviation is as to the facts and circumstances which will be sufficient to justify it on the ground of usage or necessity.<sup>2</sup> Where there is a known usage as to the course, or touching at particular ports, or anything else in the conduct of the voyage, the parties are supposed to be acquainted with such usage, and have it in view when they enter into the contract.<sup>3</sup> In the case of *Noble v. Kennoway*,<sup>4</sup> Lord MANSFIELD said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year." The Supreme Court of the United States, in *Columbian Insurance Company v. Catlett*,<sup>5</sup> says that the true meaning of a policy is to be sought in an exposition of the words with

<sup>1</sup> 1 Ph. on Ins. 480.

<sup>2</sup> 3 Kent's Comm. 312.

<sup>3</sup> 1 Ph. on Ins. 480.

<sup>4</sup> 1 Doug. 513.

<sup>5</sup> 12 Wheat. 396, 387.

## Illustrative Cases.

reference to the known course and usage of the trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation depends upon the nature of the voyage and the usage of the trade. In the case of *Clark v. United Marine and Fire Insurance Company*,<sup>1</sup> Judge SEWALL says that "questions are continually arising on the operation and practical construction of policies of insurance, a species of contract liable to a variety of incidents, and to be enforced in a great number of cases distinguishable from each other in the principles applicable to the decision. For rules to govern in these inquiries there is more than ordinary reference to established usages; and these, when ascertained, and found to be suitable applications of general principles, or not inconsistent with them or with the tenor of the contract to be explained and enforced, are considered as authoritative upon the parties. A reference to usage is fairly implied in contracts of a commercial nature, and it is to be presumed, indeed, in the construction of contracts generally, where the conclusion is not avoided by special circumstances or stipulations." In the case of *Gordon v. Little*,<sup>2</sup> Judge GIBSON, who denied that evidence of usage or custom fixing the construction of the words in a bill of lading is admissible, fully recognizes the relaxation of the common-law rules of evidence in the case of a policy, and admits that the usage of every particular trade necessarily enters into every policy, and is resorted to for the purpose of explaining and even controlling those parts of the instrument that are merely formal.

These instances are sufficient to show that the construction of contracts of insurance are peculiarly influenced by usage; that evidence of usage is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; and that the custom then becomes a part of the contract, and may be considered as the law of it. Policies in the same terms will receive different interpretations as applied to different voyages. There is nothing in the usage relied on in this case as a justification for the detention which would condemn it on the score of impolicy. As the services are always rendered for a remuneration, not much can be said in behalf of the humanity of the usage. That can only be vindicated by a gratuitous service, and making those rendering assistance their own insurers. It is admitted that the usage relied on as a justification for the detention to succor vessels in distress is coeval

<sup>1</sup> 7 Mass. 345.<sup>2</sup> 8 Serg. & R. 562, *ante*, p. 123.



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Walsh v. Homer.

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with steamboat navigation on the Mississippi River. It must be presumed to have been known to all those who in any way have been affected by it. Contracts of insurance must be supposed to have been made with an eye to its existence. Is not the long existence of the usage some evidence of its policy? Had it been found contrary to the public good, would not the keen and steady sense of their interests have induced commercial men to demand its abolition, or to have guarded against it by stipulations in their contracts? This has not been done. The practice still continues; and we must presume that the master, the shipper, and the insurer all find advantages in maintaining and supporting it. The boat that renders assistance to-day may, in her turn, want it to-morrow. A boat of comparatively little value may be destroyed to-day which the day before had been detained in saving from destruction one worth thousands, and both may have been insured by the same underwriters. Experience must have shown that in such adventures a reciprocity of kind offices promotes, upon the whole, the interests of every one concerned in them. The abuse of this usage in our inland navigation to the prejudice of underwriters cannot be carried to the excess to which it might extend in the navigation of the ocean. The facility of obtaining witnesses to a breach of duty by the master would tend greatly to check all approaches to misconduct on his part.

I am free to confess that the change in the form of the policy of insurance which was made by the insurance companies in St. Louis after the decision in the case of *Settle v. St. Louis Perpetual Insurance Company* has had its influence on my mind in the determination of this cause. If the law was declared in that case as it had previously been understood, why make the change? That change shows that the defence set up by the company in the above-mentioned case was unjust; that the understanding of the parties was that a detention to save vessels in distress was justifiable. I had my doubts how far the usage set up should operate in the construction of the contract; but, now that the solemn admission is made of record that the usage was in fact, and not merely in the eye of the law, in the contemplation of the parties at the time of entering into the contract, and as there is nothing in that usage contrary to the policy of the law, I can see no ground for withholding from it its full effect. The peculiar phraseology adopted in making the alteration in the contract of insurance cannot disguise its real object. I am glad it is yet in the power of the court to correct the irregularity of the former decision. Pride of consistency shall never induce me to persist in error.

NAPTON, J., concurring, the judgment will be reversed.

*Judgment reversed.*



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 Illustrative Cases.
 

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## 16. LANDLORD AND TENANT—CUSTOM AS TO WAYGOING CROP.

## WIGGLESWORTH v. DALLISON.\*

*In the Court of King's Bench, Trinity Term, 1779.*WILLIAM, Earl MANSFIELD, *Lord Chief Justice.*

EDWARD WILLES, Esq.,

SIR WILLIAM HENRY ASHHURST, Kt., } *Justices.*

FRANCIS BULLER, Esq.,

A custom that a tenant, whether of parol or deed, shall have the waygoing crop after the expiration of his term, if not repugnant to the lease, is good.

THIS was an action of trespass for mowing, carrying away, and converting to the defendants' own use the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that true it was that the *locus in quo* was the close, soil, and freehold of Dallison; but, after stating that one Isabella Dallison, deceased, being tenant for life, and Dallison, the reversioner in fee, made a lease on the 2d of March, 1753, by which the said Isabella demised and the said Dallison confirmed the said close to the plaintiff, his executors, administrators, and assigns, for twenty-one years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession till the end of the said term of the twenty-one years, he pleaded a custom, in the following words, viz.: "That within the parish of Hibaldstow there now is, and from time whereof the memory of man is not to the contrary there hath been, a certain ancient and laudable custom there used and approved of: that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which had expired on the first day of May in any year, hath been used and accustomed, and of right ought to have, take, and enjoy to his own use, and to reap, cut, and carry away when ripe and fit to be reaped and taken away, his waygoing crop: that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof, in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that in the

\* Reported Doug. 201.; 1 Smith's Ld. Cas. 900.

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Wigglesworth v. Dallison.

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year 1775 he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the contrary. The cause was tried before EYRE, B., at the last Assizes for Lincolnshire, when the jury found the custom in the words of the replication.

*Baldwin* moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and, therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper v. Carwardine*, before YATES, J.,<sup>1</sup> the circumstances of which case were these: —

“The plaintiff had been lessee under the corporation of Hereford for a term of twenty-one years, which expired on the 4th of December, 1767. In the lease there was no covenant that the tenant should have his offgoing crop. In the seed-time before the expiration of the term he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in Herefordshire for tenants who quit their farms at Christmas or Candlemas to reap the corn sown the preceding autumn. YATES, J., held that the custom could not legally extend to leases by deed, though it might prevail by implication in the case of parol agreements: that, in the case of a lease by deed, both parties are bound by the express agreements contained in it, — as, that the term shall expire at such a day, etc., — and therefore all implication is taken away; that if such a custom could be set up, the Statute of Frauds would be thereby superseded in Herefordshire.<sup>2</sup> Accordingly, the plaintiff did not recover on the custom, although on another count (in trover) in the same declaration he had a verdict.”

A rule to show cause was granted.

<sup>1</sup> At the Summer Assizes for Herefordshire, 1769.

<sup>2</sup> *Quere*. This argument seems more applicable to parol leases, because, if a parol

lease for three years could be extended in some degree for half a year longer by such a custom, it might be said that this would be repugnant to the Statute of Frauds.

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<sup>1</sup> *Vid*

## Illustrative Cases.

The case was argued on Tuesday, the 8th of June, by *Hill*, Serjt., *Chambre*, and *Dayrell* for the plaintiff, and *Cust*, *Baldwin*, *Balguy*, and *Gough* for the defendants, when three objections were made on the part of the defendants, viz.: (1) that the custom was unreasonable; (2) that it was uncertain; (3) that, as has been contended on moving for the rule, it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was argued: *First*, that it was not an unreasonable custom, because, without an express agreement, or such a custom as this, there would be no crop the last year of the term, for the tenant would not sow if he could not reap, and the landlord would not have a right to enter until the expiration of the term; that it was for the advantage of the public as much as customs for turning a plough or drying nets on another person's land, which had been held to be good;<sup>1</sup> that it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one: not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of the term. *Second*, that it was sufficiently certain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of; for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land which arise at different times, from circumstances in the course of cultivation and husbandry. "Reasonable" is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them — as, with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, etc. In the case of *Bennington v. Taylor*, reported in *Lutwyche*,<sup>2</sup> where the defendant in an action of trespass had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and on a motion in arrest of judgment it was objected that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, it is for the jury to decide. *Third*, that the circumstance of the plaintiff's lease in this case having been by deed made no difference. There was no agreement contained

<sup>1</sup> *Vide Davis*, 32 b.

<sup>2</sup> C. B., E. or T., 12 Wm. III., 2 *Lutw.* 1517, 1519.

*Wigglesworth v. Dallison.*

in the deed that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parol contract, express or implied; and therefore the argument of repugnancy did not apply, and the *Nisi Prius* case which had been cited went upon mistaken reasoning. *Hill*, Serjt., admitted that he knew of no instance, in the reports, of a similar custom to this in the case of freehold property; but he said there were several with regard to copyholds that went much farther, and he cited *Eastcourt v. Weekes*,<sup>1</sup> where a custom that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over to the Michaelmas following, is stated in the pleadings,<sup>2</sup> and no objection taken to it on the argument of the case.

For the defendant were cited *Grantham v. Hawley*<sup>3</sup> and *White v. Sayer*,<sup>4</sup> in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral;<sup>5</sup> a case relied on by *Houghton, J.*, in *White v. Sayer*,<sup>6</sup> in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term to remove their utensils was void, as being against law; *Startup v. Doderidge*,<sup>7</sup> where the court refused to grant a prohibition on the suggestion of a *modus* "to pay upon request, at the rate of two shillings for every pound of the improved yearly rent or value of the land," because the yearly rent or value was variable and uncertain; *Nailor, qui tam, v. Scott*,<sup>8</sup> where, a custom having been found by a jury "that every house-keeper in the parish of Wakefield having a child born there should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being (1) uncertain, because the usual time for women

<sup>1</sup> T., 10 Wm. III., 1 Lutw. 799, 801.

<sup>2</sup> It is found by the special verdict, the action being *ejectment*.

<sup>3</sup> T., 13 Jac. I., Hob. 132. That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, viz.: that the question was brought on in an action of debt on a common bond, conditioned for the payment of £20 to the plaintiff if a cer-

tain crop of corn did of right belong to him or, in other words, if the question of law was in his favor.

<sup>4</sup> B. R., M., 19 Jac. I., Palm. 211.

<sup>5</sup> Cites 21 Hen. VII., c. 14.

<sup>6</sup> B. R., M., 19 Jac. I., Palm. 211.

<sup>7</sup> E., 4 Anne, 2 Ld. Raym. 1158; 2 Salk. 657; 1 Modern, 60.

<sup>8</sup> E., 2 Geo. II., 2 Ld. Raym. 1558.

## Illustrative Cases.

to be churched was not alleged; <sup>1</sup> (2) unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died before the time of churching; *Carlton v. Brightwell*,<sup>2</sup> where the defendant, on a bill for tithes, set up a *modus* that "the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for tithe corn," and it was held by the Master of the Rolls to be void for uncertainty; *Harrison v. Sharp*,<sup>3</sup> where a *modus* that "when any of the enclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas, yearly," was held void on the authority of *Startup v. Doderidge*; *Wilkes v. Broadbent*,<sup>4</sup> where the Court of Common Pleas, and afterwards, on error brought, the Court of King's Bench, held a custom found by verdict "for the lord of the manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use of the pits, and to take coals so laid away in carts, and to burn and make into cinders coals laid there, at their pleasure," to be void, because, among other reasons, the word "near" was too vague and uncertain; *Oland v. Burdwick*,<sup>5</sup> where a *feme* copyholder *durante viduitate* having sowed the land and then married, it was determined that the lord should have the corn, upon the principle that when the interest in land is determined by the act of the party, he shall not have the crop; an anonymous case in *Moore*,<sup>6</sup> where it was held that a custom "that a lessee for years should hold for half a year over his term," was bad; *Roe, Lessee of Bree, v. Lees*,<sup>7</sup> where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were enclosed and nine lay in certain open fields, a special case was reserved, which stated a custom "that when a tenant took a farm in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years," and though the court decided against the custom on other grounds, yet by their reasoning it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of one hundred acres of land

<sup>1</sup> In that case the custom, as suggested, did not refer to the usage of the parish.

<sup>2</sup> *Cane, T.*, 1728, 2 P. Wms. 462.

<sup>3</sup> *T.*, 1724, Bumb. 174.

<sup>4</sup> *B. R., E.*, 18 Geo. II., 1 Stra. 1224.

<sup>5</sup> *B. R., H.*, 37 Eliz., Cro. Eliz. 460; 5 Coke, 116.

<sup>6</sup> *H.*, 3 Edw. VI., J. B. Moo. 27, pl. 8.

<sup>7</sup> *C. B., M.*, 18 Geo. III., since reported in *W. Black.* 1171.

## Wigglesworth v. Dallison.

enclosed. Besides the above authorities,<sup>1</sup> the case before YATES, J., was much relied on. It was admitted that in cases where the usual crop of the country is such that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parol demise, may be raised by implication—as, where saffron is cultivated in Cambridgeshire, liquorice near Pontefract, or tobacco, which formerly used to be planted in Lincolnshire. But it was contended that in such cases a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument. Such a custom as that set up in the present case could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of Richard I., and long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the 1st of May, old style, and this lease was made and commenced after the alteration was introduced by 24 Geo. II., c. 23.<sup>2</sup>

The court took time to consider, and this day Lord MANSFIELD delivered their opinion, as follows:—

Lord MANSFIELD. — We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows ought to reap; and it is for the benefit and encouragement of agriculture. It is indeed against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap.<sup>3</sup> But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease.<sup>4</sup>

*The rule discharged.*<sup>5</sup>

<sup>1</sup> 4 Coke, 51 b; 1 Roll. Abr. 563, pl. 9, and Co. Lit. 55, were also cited for the general principles concerning customs and emblements.

<sup>2</sup> The new style commenced the 1st of January, 1753. But if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as from the errors in the former method of computation the nominal day was continually deviating, by degrees, from the natural day.

<sup>3</sup> See 14 & 15 Vict., c. 25, § 1, giving the tenant, in lieu of emblements, a right to

occupy until the end of the current year of his tenancy.

<sup>4</sup> *Vide Doe v. Snowden*, C. B., M., 19 Geo. III., W. Black. 1225, where it is said by the court that if there is a taking from old Lady-day (April 5), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (February 2), to prepare for the Lent corn, without any special words for that purpose—i.e., in a written agreement for seven years, for the court were speaking of such an agreement.

<sup>5</sup> Judgment was accordingly entered for the plaintiff, upon which a writ of error was

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## 17. MASTER AND SERVANT—USAGE AS REGULATING TERM OF SERVICE.

## HOLCROFT v. BARBER.\*

*Before Wightman, J., in the English Court of Queen's Bench, Trinity Term, 1843.*

In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged. *Held*, that he might show that it was customary for editors of newspapers to be engaged for a year unless there was an express stipulation to the contrary.

**ASSUMPSIT.** The declaration stated that on the first day of January, 1842, "in consideration that the plaintiff, at the request of the defendants, would enter into the employ of the defendants in the capacity of editor of a certain periodical, publication, or newspaper, called the *Monthly Times*, for a certain time, to wit, for one whole year, commencing, to wit, on the day and year aforesaid, at and for a certain salary and wages, to wit, £10 per month," the defendants promised the plaintiff to retain and employ him in the capacity aforesaid, at and for the salary and wages aforesaid, and to continue him in such employ for the said time, to wit, for one whole year, commencing, to wit, on the day and year aforesaid; and although the plaintiff, confiding, etc., did afterwards enter into the employ of the defendants, "in the capacity aforesaid," yet the defendants wrongfully dismissed him within the year. Plea: *Non assumpserunt*.

It appeared that in the month of December, 1841, the defendants were about to commence the publication of a newspaper called the *Monthly Times*, which was to be printed in London once a month, and sent to India; and that the plaintiff wrote the leading articles of the paper from the month of January, 1842, to the month of June in the same year, both inclusive, for which he was paid £10 for each month.

It appeared from the evidence of Mr. Kelly, the printer of the paper, that Mr. Stephenson was the person who had the management of the paper; and he stated that Mr. Stephenson was the editor of it, and had on one occasion rejected a part of a leading article which had been

\* Reported 1 Car. & Kir. 4.

brought in the Exchequer Chamber, and the defendant assigned for error "that the custom contained and set forth, etc., is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." The case was argued at Sergeants' Inn before the judges of Common Bench and the barons of

the Exchequer, by Balguy for the plaintiff in error, and Chambre for the defendant. The objection to the reasonableness of the custom was abandoned. In T., 21 Geo. III. (June 27, 1781), Lord Loughborough delivered the unanimous opinion of the Court of Exchequer Chamber that the custom was good, and the judgment was affirmed.



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Holcroft v. Barber.

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written by the plaintiff. With respect to the engagement of the plaintiff being for a year there was no direct evidence except the following letter, written by Mr. Stephenson to the plaintiff: —

“ SATURDAY, Dec. 11, 1841.

“ MY DEAR HOLCROFT: Can you, without much trouble, look in on Monday at 11 or 12? It is too long to write about, but refers to another opening for your putting about £120 a year additional into your pocket. Ever sincerely yours,

R. MACDONALD STEPHENSON.

“ P. S. — Legitimate business, and not speculation!!! ”

A letter (without date) of the defendant Barber to the plaintiff was also put in. It contained the following passages: “ We regret to say that the last mail does not bring us satisfactory account of our spec. as regards the *Monthly Times*, and we are therefore constrained to forego the monthly summaries for which we have been indebted to your good offices. \* \* \* We are desirous to express the proprietor’s full approbation of the style and matter which your pen has furnished.”

*Platt*, for the plaintiff, proposed to call witnesses to show that there was a custom that editors, sub-editors, and reporters of newspapers were engaged for a year unless it is otherwise expressed at the time of making the engagement.

*Crowder*, for the defendants. — I submit that the evidence is not receivable. This is a matter of contract only, and not a matter of custom, any more than hiring a groom. One master may hire his servants on certain terms, and another upon quite different terms, just as they may agree with their servants.

*Platt*. — In the case of a groom, the usage is a month’s wages or a month’s warning. Evidence of usage always has been received.

WIGHTMAN, J. — You may go into evidence to show a custom.

Mr. Powell was called. He said the custom is that the engagements of editors, sub-editors, and reporters upon newspapers are annual unless expressly stated to be otherwise.

WIGHTMAN, J. — Does your custom apply to contributors, who are neither editors, sub-editors, or reporters?

Mr. Powell. — To persons engaged to regularly supply the leading articles.

WIGHTMAN, J. — Then it stands thus: that engagements of editors, sub-editors, reporters of newspapers, and persons who are engaged to regularly supply the leading articles of newspapers, are for a year unless otherwise expressed. That would be so in the case of a clerk or servant.

This custom was also deposed to by Mr. James Woods and Mr. Knox,

## Illustrative Cases.

who had both of them been many years connected with newspapers; but none of the witnesses knew of any instance of the custom being applied to a newspaper which came out once a month. They also stated that the person who wrote the leading articles they should consider as the editor of a newspaper, and that the person who had the management of the paper they should rather consider as a sub-editor; but that on many publications—particularly on the great London newspapers—there were several persons who were editors, and who took different portions of the editorship, and that therefore, in such cases, no one person would be considered as the editor.

*Crowder*, for the defendants, addressed the jury, and submitted, first, that the plaintiff was not engaged by the defendants "in the capacity of editor," as stated in the declaration; and, secondly, that the custom deposed to by the witnesses as to the engagements of editors, sub-editors, and reporters did not apply to a paper published once a month to be sent abroad, this being a new species of paper, published on speculation, and not a newspaper on which the engagements would be permanent.

*WIGHTMAN, J.* (in summing up).—There are two questions in this case: First, did the defendants engage the plaintiff as the editor of this publication? for if the plaintiff was not engaged as the editor, he must fail in this action, as he is described in the declaration as having been so engaged; and, secondly, if he was engaged as the editor, was he engaged for a year by express words, or by any custom which prevails in the business, though nothing was said in express words as to the duration of the engagement? On the first point, *Mr. Kelly*, the printer, says that *Mr. Stephenson* was the editor; and he also states that *Mr. Stephenson* had the management of the paper, and rejected a part of one of the plaintiff's articles. There is no doubt that the plaintiff was a contributor to the paper, and that he wrote the leading articles, subject, as appears in that instance, to the control of *Mr. Stephenson*. There are several witnesses who state that they consider that the plaintiff was the editor, notwithstanding this, and that *Mr. Stephenson* was rather the sub-editor; but it is difficult to reconcile this with the statement that *Mr. Stephenson* had the power of rejecting the articles written by the plaintiff; and you have the direct testimony of *Mr. Kelly* that *Mr. Stephenson* was the editor, and the fact that in no part of the correspondence is the plaintiff spoken of as the editor. If you think that the plaintiff was not the editor, and did not fill the situation designated in the declaration, your verdict should be for the defendants; but if you think that the plaintiff did fill the situation mentioned in the decla-

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Waring v. Grady.

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ration, you will then consider whether there was an engagement for a year. The paper came out once a month, and the plaintiff was paid £10 per article, and the letter of Mr. Stephenson speaks of its being about £120 a year; but as twelve articles at £10 each would be £120 a year, this does not necessarily show that the engagement was for a year. This brings us to evidence of the custom, and on this part of the case it is proved by a number of gentlemen who have been employed both as editors and sub-editors that the custom is, that a person who is upon the regular employ of the newspaper press is employed for a year unless it be otherwise expressed; but there seems to be some doubt whether that custom applies to a paper like the present, as this is the rather anomalous case of a paper published only once a month, and to be sent to India as a sort of speculation, for we find the word "spec." is used in one of the letters. The witnesses, however, all agree that it is not so much whether the person is called editor, sub-editor, or reporter, but that if the person be permanently employed (not occasionally only) to supply a particular department of a newspaper, — as, for instance, the leading article, or reports of the Parliamentary debates, — and no more be said, that is an engagement for a year; and if the engagement be for a year, that engagement is reciprocally binding on both parties. You will first say whether the plaintiff was engaged as the editor of the paper, as stated in the declaration; and if he was, you will then say whether, by the custom, a person who is so employed is engaged for a year unless it be otherwise expressed.

Verdict for the defendants, the foreman of the jury adding, "We do not consider that Mr. Holcroft was the editor."

*Verdict for the defendants.*

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18. PARTNERSHIP—POWER OF PARTNER MAY BE ENLARGED BY USAGE.

WARING v. GRADY.\*

*In the Supreme Court of Alabama, June Term, 1873.*

HON. THOMAS M. PETERS, *Chief Justice.*

" BENJAMIN F. SAFFOLD, }  
 " ROBERT C. BRICKELL, } *Judges.*

It is the custom on the Alabama River for the proprietors of steamboats to purchase salt at Mobile, to be carried up the river and sold. *Held*, that, in the absence of a contrary

\* Reported 49 Ala. 465; 20 Am. Rep. 286.

## Illustrative Cases.

stipulation in a partnership agreement made for the purpose of running a steamboat on that river, the firm would be liable for salt purchased by a partner at Mobile for transportation and sale on the boat.

**ACTION** by the firm of Waring & Son against P. A. Grady and John J. Moulton, upon an account. It was alleged in the complaint that the defendants were copartners and joint owners in the steamboat Black Diamond, and in the freight thereof, and that defendants were indebted to plaintiffs for two hundred sacks of salt delivered to defendants as freight of such boat. In support of these allegations, which were denied, the plaintiffs at trial gave evidence, which was uncontradicted, to show that defendants were joint owners of the boat mentioned; that it was run by defendants from Mobile upon the Alabama and Tombigbee Rivers, for freight and passengers; that the profits and losses arising in such employment were divided between defendants; that it was, and had been for many years, the common practice in that trade, when the ordinary freight was scarce, and therefore deemed advantageous to increase the freights of the boat, to purchase salt at Mobile to be carried up the river and sold, or exchanged for wood or expenses; and that this usage of the trade was deemed good economy, and was recognized and known to all the steamboatmen, merchants, and others, and to owners engaged in said trade, and was considered within the scope of said business; and that this was also often done when no regular freight was offering, to raise money to pay the expenses of the up trip, to be repaid out of the profits of the down trip; and that it was, and is now, the every-day practice for owners and masters in charge of steamboats to make such purchase on account of the boat and owners, for the benefit of the vessel and to increase or make up profits. The plaintiffs delivered salt, at the request of Moulton, for such use on the boat named, which they charged to the boat and its owners. The defence set up by Grady, and established by evidence, was that he had no knowledge of the purchase of the salt, and did not assent to it, and that the salt was sold for said Moulton's benefit.

The court charged that unless Grady was aware of the purchase, or authorized or assented to it, he would not be liable for the salt, and refused to charge that the custom proved affected the partnership contract. The plaintiffs appealed.

*Boyles & Overall and George N. Stewart, for the appellants; D. C. Anderson, for the respondent.*

**PETERS, C. J.** — A partnership is created by an agreement of the parties who constitute it, and it may be entered into with reference to a custom or usage of the place where its business is to be transacted. If

*Goodenow v. Tyler.*

this custom is a legal one, and such as the law will enforce, it may modify the legal effect of the partnership agreement; and such a custom may be shown, in connection with the contract, to establish the intention of the parties in entering into it, for such a custom becomes a part of the contract itself, and explains its stipulations.<sup>1</sup> This doctrine, applied to this case, very clearly shows that the charge asked by the plaintiffs below ought to have been given to the jury. This charge was not abstract, but was fully supported by the evidence, which was wholly uncontradicted. It was asked in writing, and it contains a fair statement of a legal proposition applicable to the issues submitted to the jury. The court erred in refusing to give it.

The charge given by the court was also incorrect, and was calculated to mislead the jury. It had the effect to withdraw from their consideration all that part of the evidence which tended to establish the custom or usage which modified the legal effect of the partnership agreement in reference to the purchase of the salt. Such a charge cannot be sustained.<sup>2</sup> If the obligations of the partnership were modified by the usage attempted to be proven, of which the jury must judge, then the contract of partnership permitted the salt to be purchased. What this contract permitted was within the scope of the business in which the firm was engaged; and within this scope or limit the act of one partner is the act of all, and binds all.<sup>3</sup> If a partner wishes to protect himself against such a usage, the partnership agreement should be so framed as to do this, or he should give notice of a dissent.<sup>4</sup> The judgment of the court below is reversed, and the cause is remanded for a new trial.

*Judgment reversed.*

## 19. PRINCIPAL AND AGENT—USAGE GOVERNS AGENT'S POWERS.

GOODENOW *v.* TYLER.\*

*In the Supreme Judicial Court of Massachusetts, September Term, 1870.*

HON. THEOPHILUS PARSONS, *Chief Justice.*

“ THEODORE SEDGWICK,  
“ SAMUEL SEWALL,  
“ ISAAC PARKER, } *Justices.*

T., a factor, having goods consigned to him by G., sold them on three months' credit, taking in payment the purchaser's promissory note to himself; but the purchaser, before the

\* Reported 7 Mass. 36; 5 Am. Dec. 22.

<sup>1</sup> *Sampson v. Gazzam*, 6 Port. 123; *Mills v. United States Bank*, 11 Wheat. 431; *Cutter v. Powell*, 6 Term Rep. 320.

<sup>2</sup> 29 Ala. 198; 24 Ala. 651; 23 Ala. 17; 22 Ala. 501, 796.

<sup>3</sup> 3 Kent's Comm. 40, 41; 1 Pars. on Con. 174, 175, and cases there cited.

<sup>4</sup> 27 Ala. 245.

## Illustrative Cases.

maturity of the note, became bankrupt. In an action by G. against T. for the value of the goods sold: *held*, that evidence that he had acted according to the custom of the place was admissible, and would discharge him from liability.

**ACTION** against the defendant to recover the value of a pipe of gin, the property of the plaintiff, sold by the defendant as factor for the plaintiff. It appeared that defendant had taken the promissory note of the purchaser of the gin in payment therefor, and that before the maturity of the note the maker became bankrupt; that plaintiff gave no orders whether to sell for cash or on credit; and that it was the custom in Boston, where the sale was effected, for factors to sell on credit at the risk of their principals, unless an additional premium was allowed for taking the risk upon themselves. Evidence to prove that it was customary to take promissory notes where credit had been given by the factor was rejected. The judge directed a verdict for the plaintiff for the value of the gin, after deducting the amount of defendant's commissions, because the factor had received a negotiable note in payment. A motion for a new trial was then made, on the ground of misdirection of the judge.

*Bigelow*, in support of the motion.

*Lincoln, contra*, contended that the factor, having had no instructions to sell on credit, was, immediately upon the sale, chargeable with the value of the goods, as the negotiable promissory note taken was payment; <sup>1</sup> and that an action for money had and received was the proper remedy.<sup>2</sup>

**PARKER, J.** — The plaintiff would insist that a factor, under the circumstances of this case, had no authority to trust the purchaser, and that, having so done, he became immediately chargeable to the principal for the price. But the law-merchant clearly contradicts this principle, it being well settled that a factor may sell upon credit without taking upon himself the debt, unless he is restricted from so doing by the orders of his principal. And this principle is reasonable, and for the benefit of those who send their goods to market; for otherwise they would be frequently sold at a sacrifice, or remain unsold at the expense of the owner.

But even if this were not settled law, it is very clear that the usage of the market where the goods are sold would bind the owner, for he is presumed to be conversant of that usage; and if he is silent in his directions to his factor as to the terms of the sale, he is considered as intending to be governed by the usage. Then, if the factor had author-

<sup>1</sup> 4 Bac. Abr., tit. "Merchant," B; 2 Mod. 100; Bulst. 101.

<sup>2</sup> *Barelay v. Gooch*, 2 Esp. 571.



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ity in this case to sell on credit at the risk of his principal, there being no complaint of negligence, carelessness, or want of skill in making his bargain, either of which might have made him liable to the owner notwithstanding his general authority, the question arises whether the mode in which the defendant gave the credit in this case has fixed the debt upon him. A promissory negotiable note, payable to himself, was taken; and this is the point upon which the judge at the trial thought the liability of the defendant rested. But I do not see why this should change the nature of the case.

The relation between the principal and factor remains the same as if the factor had taken a note not negotiable, or had charged the article sold in his book and had made the purchaser debtor to himself, which he certainly might have done, keeping an account at the same time between himself and the principal. That the note was negotiable was favorable to the principal, because it could easily be assigned by the factor to him. It is considered by the law as taken in trust for the principal; and if the factor should refuse to assign it on demand, doubtless he would be liable in an action by the principal.

It is said that a negotiable note given for the amount of an account for goods sold discharges the original contract. This is true, as settled in this Commonwealth, between the vendor and vendee; but it surely does not follow that because the factor has changed an account on his book into the more simple and convenient evidence of debt, a note of hand, that for this cause only he has burdened himself with a debt for which he received no consideration.

I am, therefore, of opinion that there ought to be a new trial.

SEWALL, J. — If I was satisfied that, upon established principles, a factor who sells the goods of his principal upon credit and receives a promissory note for the amount of the sales, payable to himself and negotiable, became thereby immediately accountable as if he had sold for money, I should think a new trial ought not to be granted. But I am not satisfied that this is the law. I think the rule in this respect must depend upon the particular usages of commission merchants, and that the law upon this subject as to the authority of the factor and the extent of his liability is referable to known and established usages, where the parties rely altogether upon the general relation and implied duty of a merchant and factor, no directions or agreement having been expressed between them or proved in the case.

I think usage is competent evidence, in a case of this nature, to show the implied intentions and understanding of the parties. As evidence to the effect of proving a usage of selling upon credit, and of taking



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negotiable promissory notes payable to the commission merchant, was offered in this case and rejected at the trial, I think there ought to be a new trial, leaving it for the present undetermined how far the usage will justify the conduct of the defendant in the case at bar. It is very certain that no usage can justify the defendant in any wilful negligence in securing the property of his principal; and if his conduct has been such as to show that he had received and treated the note given for the gin as his own demand, he may be liable, notwithstanding a usage to sell upon credit and to take notes in payment should be fully proved.

PARSONS, C. J., stated the nature of the action and the substance of the judge's report, and proceeded: Without considering how far the evidence comports with the declaration, which point is not before us on the report, I shall confine my opinion to the direction of the judge.

The court will take notice, as a part of the law-merchant, that a factor may sell goods at a reasonable credit, at the risk of his principal, when he is not restrained by his instructions nor by the usage of the trade. He is not, however, authorized to give credit to any but persons in good credit, and whom prudent people would trust with their own goods. If, through carelessness or want of reasonable inquiry, he sell on credit to a man not in good credit, and there be a loss, the factor must bear it.

When a factor sells on credit, he may take from the purchaser some instrument by which the purchase may appear, with the price and the time of payment, and on which the purchaser may be charged in an action at law. And it is very clear that he is not obliged to disclose to the purchaser the name of his principal, or even to state to him that he sells as factor. Upon these principles he may take a promissory note payable to himself; and when the principal lives in a foreign country, it may be most convenient for him to have the security payable to himself, so that he may sue it in his own name. When the security is in the name of the factor, he holds it in trust for his principal. If the principal demand it, offering to pay the commission, and the factor refuse to assign it, he then becomes answerable for the money. So, if the money be lost by his negligence in not seasonably demanding it, the factor is responsible for his negligence.

Upon these principles, it seems very clear that in this case, if the defendant had taken a note to himself, not negotiable, to secure the payment of the money, he would have been a trustee of such note for the plaintiff; and if the money could not be recovered, without any laches on the part of the defendant, he would in law be discharged. But in

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this case the defendant took as security a negotiable note in his own name. And it is said that such note is payment by which the purchaser is discharged from the principal, and consequently that the defendant assumed the debt on himself, and is at all events answerable. It must be admitted that in this case it has been settled by a series of decisions which can be traced back sixty years, that where a negotiable note is given to secure the payment of money due by a simple contract, the simple contract is holden to be satisfied or merged in the note, lest the debtor on the simple contract should be holden to pay it to the creditor, and afterwards, as promisor of the note, be holden to pay its contents to an innocent indorsee. But the discharge of the debt due by the simple contract is the consideration for the negotiable note. When a factor shall receive a negotiable note in payment for goods sold on commission, as the consideration arises from the sale of his principal's goods, the note may be holden in trust for the principal. But if it be so holden in trust, and the principal demand the note, offering to pay the commission, and the factor refuse to assign it without a right of recurring to himself, this is a breach of his trust which will make him answerable. He is also answerable if he negotiate the note for his own use, or if the money be lost by his neglect of demanding it of the parties to the note. Although a negotiable note may change the remedy against the purchaser on credit if he fail to pay, yet the relation between the principal and factor may not be affected. If the law or the usage were not so, the disadvantages to the principal would be great. No factor would ever take a negotiable note as security in his own name, unless for an extra compensation as guaranteeing the payment. By taking such a negotiable note the principal is not obliged to wait for his money until due, but the factor may immediately discount the note and receive the money. But when the principal lives abroad such discount is impracticable, unless by sending the note and having it returned indorsed by him. Another great benefit of a negotiable note in the name of the factor is, that he may, on the credit of it, make advances to his principal, which is often desired before the money is due. And the advances are easily procured by the factor's discounting the note. But if the note is in the name of the principal, the factor cannot, on the credit of it, make any advances to his principal.

For these reasons I am satisfied that the principle holden by our courts, that a negotiable note is a bar to an action on a simple contract which is the consideration of the note, does not necessarily and absolutely affect the relation between a factor and his principal as to the

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authority of the former to take a negotiable note in his own name in trust for the latter.

Whether, in deciding this point, we can judicially take notice of the usage in Boston, to which place the plaintiff sent his goods to be sold on commission, may be questioned. But a general usage in any place by which sales on commission are regulated may be given in evidence; for it is a reasonable and legal presumption that every man knows the usage of the place in which he traffics, whether by himself or his factor, and if the usage be not illegal he is bound by it. If, then, it be the well-known and uniform usage in Boston for the factor to take negotiable notes in his own name as a security for the payment for the goods of his principal, sold on credit, but in trust for his principal, such usage must bind the principal, unless he give his factor instructions repugnant to it; and such usage may be proved to a jury. Now, I am satisfied that such is the usage in Boston, and, I believe, in every commercial city in the United States where goods are sold by factors on commission.

In applying these observations to the case before us, there seems to be no imputation in the report, whatever may appear to be the case on another trial, of laches in the defendant in selling the plaintiff's gin on credit to Chapin, nor in collecting the money. Chapin failed before the money was payable. But the defendant took as security from Chapin his negotiable note, payable to himself or his order. It is not pretended that the defendant was to guarantee Chapin's payment, or that he had any commission on that account. The only point is, whether the defendant, by receiving from Chapin his note payable to himself or his order, made himself liable in all events to the plaintiff for the payment of the money due on the note.

My present opinion is that, on general principles of the law-merchant, independent of any usage in Boston, the defendant did not make himself thus liable; but if there be any doubt as to these general principles, evidence of the general and uniform usage in Boston, where the plaintiff sent his goods for sale on commission, that the factor takes negotiable notes for payment in his own name, but in trust for the principal, may be legally given in evidence. Upon these grounds I am satisfied that the verdict ought to be set aside and a new trial granted.

SEDGWICK, J., delivered a dissenting opinion.

*New trial ordered.*

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Jones v. Bowden.

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## 20. VENDOR AND PURCHASER—USAGE AS TO WARRANTY.

## JONES v. BOWDEN.\*

*In the English Court of Common Pleas, May, 1813.*Rt. Hon. Sir JAMES MANSFIELD, *Lord Chief Justice.*

JOHN HEATH, Esq.,

Sir SOULDEN LAWRENCE, Kt.,

Sir ALAN CHAMBRE, Kt.,

Sir VICARY GIBBS, Kt.,

} *Judges.*

A warranty may be implied from the custom of a particular trade. It being usual, in the sale by auction of drugs, to state in the catalogue if they were sea-damaged or not, and if nothing is said as to their quality, they are supposed to be sound, the defendants offered for sale a quantity of sea-damaged pimento, without saying anything about its condition, which was purchased by the plaintiff. *Held*, that this was equivalent to a sale of the goods as and for goods that were not sea-damaged, and that an action lay for the fraud.

THIS was an action upon the case for a deceit in the sale of some pimento. The first count of the declaration stated a warranty that the pimento was sound, and in good state and condition, and free from damage. The second count stated that the defendants, well knowing that divers, to wit, twenty, bags of the pimento had been and were sea-damaged, and in a bad state and condition, and that divers, to wit, eighty-one, bags thereof were also damaged, and in a bad state and condition, did nevertheless falsely, fraudulently, and deceitfully represent the same one hundred and one bags of pimento to be sound, and in a good state and condition, free from damage, and thereby induced the plaintiffs to buy the same, etc., whereas, in truth, the pimento at the time of the sale and representation was not sound, etc. The third count alleged that the defendants were desirous of selling, and put up to sale by the candle, certain other pimento, whereof divers, to wit, twenty, bags had been and were sea-damaged, and in a bad state and condition, and divers, to wit, eighty-one, bags, residue thereof, were also unsound and damaged, in a bad state and condition, and of little value, nevertheless the defendants, well knowing the premises, did fraudulently and deceitfully sell the same as and for pimento of sound quality, and in a good state and condition, and not damaged, to the plaintiffs. The cause was tried at Guildhall, at the Sittings after Trinity Term, 1812, before MANSFIELD, C. J. The evidence was that the defendants, who were brokers, had a sale by candle on the twenty-ninth day of March, 1810, and had previously circulated a catalogue of sale, in which were

\* Reported 4 Taun. 348.

## Illustrative Cases.

included "187 bags of pimento, bonded," and at the foot of the catalogue was inserted a declaration as follows: "The goods to be seen as specified in the catalogue, and remainder at No. 36 Camomile Street." The defendants had, about two months before, purchased the pimento in question for their principal, at a sale comprehending both damaged and undamaged pimento, under a catalogue which stated this to be sea-damaged. The purchaser had repacked it. Pimento, although not damaged, yet if it has been repacked, or is contained in bags that have been discolored by sea-water, produces a less price in the market than pimento of the same quality which has not been repacked nor the bags discolored, either of those circumstances bringing it into discredit. The defendants had drawn from the bulk, for the purposes of the present sale, samples which were impartially taken, and were exhibited to the bidders, whereby it appeared to be dusty and of an inferior quality; but it did not thereby appear that it had been sea-damaged, neither did it nor can it ever appear by the sample whether pimento has been repacked or not. The plaintiffs became the purchasers. At the time of this sale good pimento was worth about 14*d* per pound, and the price given for the article in question, which was about 13*d*, was no more than a reasonable price for it, after taking into consideration the fact that it had been sea-damaged and repacked. Pimento is sometimes sold with an express warranty of soundness; but when damaged pimento is offered to sale by auction it is usual in the trade to state that it is damaged, and if nothing is added with respect to its quality it is supposed to be sound. The goods in question were offered to sale by the auctioneer without any addition or comment, and though the advertisements stated that it was to be seen at the docks, they were never distributed until the day next before the sale, and no one, in fact, then inspected the goods. For the plaintiffs, it was urged that there was a defect known to the seller, but unknown to the buyer, and one which the buyer had no reasonable means of discovering, and the question was whether that were a fraud; and if it were a fraud, whether it could be recovered for in the form of declaration above stated; and the cases were cited of *Parkinson v. Lee*<sup>1</sup> and *Mellish v. Motteux*.<sup>2</sup> The defendants insisted that they were not liable. The jury said that the state of the goods ought to have been communicated by the defendants to the plaintiffs, and found a verdict for the plaintiffs for £423, the price they had given, subject to the two points reserved: whether the action could be at all maintained, under the circumstances; and if it could, whether it could be maintained on the third count.

<sup>1</sup> 2 East, 314.<sup>2</sup> Peake N. P. 115.

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*Lens*, Serjt., in Michaelmas Term, 1812, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

*Shepherd and Vaughan*, Serjts., now showed cause. They relied on the evidence as having proved a custom in the trade to declare at the time of sale that the goods were damaged, when such was the case, and insisted that, therefore, the passing over that fact in silence was equivalent to a representation, nay farther, it was even a warranty that the goods were sound. Every circumstance which lowers the value of the goods in the market is a defect which ought, under that custom, to be disclosed by the seller. It was clear that the defect was in this case known to the seller. The buyer had not the means of discovering, by the exercise of ordinary diligence, the facts that the pimento had been sea-damaged and repacked. The sample would not show it. The reference to the goods bonded in the docks was nugatory, for bonded goods are surrounded with such a mass of other goods that it is impracticable to inspect them. The jury, in saying that the defects ought to have been communicated, had found that there was fraud in fact. The plaintiffs were therefore entitled to retain their verdict on the third count, which alleged it to be done *scienter*, it not being pretended that there was any ground to arrest the judgment on that count.

*Lens* and *Best*, Serjts., *contra*. — The mere silence is neither a warranty nor even a representation, for the defendants sell by a printed particular referring to the place where the goods are to be inspected. This brings the case within the principle of *Baglehole v. Walters*,<sup>1</sup> *Mellish v. Motteux*, and *Pickering v. Dowson*,<sup>2</sup> viz. : that where the buyer has an opportunity of examining, the seller is not bound to disclose the defects. The catalogue, stating that the pimento was bonded, referred the bidders to the docks for an inspection. If such part as was there was difficult to be seen, yet the plaintiffs might have inspected such part as was in Camomile Street. Mere silence, where the party is not called on to declare, is not a representation. *Aliud est tacere aliud celare*,<sup>3</sup> The doctrine that a sound price is evidence of a warranty of a horse, is long since justly exploded. It was competent to the purchaser to call for another criterion of the quality than the sample, or to make inquiries respecting such qualities as the sample did not disclose : but he makes no inquiries. The general rule is, that where there is no express warranty, unless the seller practices some trick, the maxim *caveat emptor* applies. The evidence of the practice to mention the defect when drugs were damaged, did not amount to proof of a uniform custom in this trade to disclose all faults. It was in evidence that the brokers fre-

<sup>1</sup> 3 Camp. 154.

<sup>2</sup> 4 Taun. 779.

<sup>3</sup> Cic. De Off., lib. 3, tit. 60, p. 383, Stenb.



## Illustrative Cases.

quently sold drugs with an express warranty, which would be superfluous if there were an invariable implied warranty; nor did the plaintiffs, at the trial, rely on that special usage, otherwise the fact would have been more closely examined into. There is no count on which the plaintiffs can recover; if there be any ground of action at all, the case must rest on the sort of duty of which a breach is intended to be averred by the third count, but that count alleges a fraud founded on facts entirely different from those which exist. It does not state that which is the only subject of complaint, the concealment by the sellers of the technical defect of repacking and stained bags. The allegation therein that the defendants sold the pimento as and for pimento of a sound quality, and in good state and condition, is disproved by the evidence, which was that the defendants sold it by the sample, and that the sample showed it to be dusty and of inferior quality. If that count could be supported by such evidence, a purchaser would have, upon discovery of the slightest defect in the quality of the goods, the full benefit of a warranty where a warranty had never been given.

MANSFIELD, C. J. — If, in this case, any ground had been laid by affidavit to show that the defendant had been at all surprised or misled as to what might be proved against him on this third count, we might have thought it proper to send it again to a jury; but the case was not moved on the ground of surprise, and there is no such evidence; and the jury having stated that they thought the defendants ought to have disclosed the sea-damage, though neither the defendants particularly cross-examined, nor did the plaintiffs expressly examine their witnesses to prove or disprove the custom, and there being this strong circumstance: that the defendants bought the goods for sea-damaged, the distinction between pimento that was sea-damaged and that which was not sea-damaged being perfectly known, I think it would be too much to deprive the plaintiffs of the benefit of this verdict. Since it is usual to mention the fact if pimento is sea-damaged, when this is not mentioned as such, how would any one understand the catalogue, having simply the word "pimento," but not particularized as being sea-damaged? As to the sample, it is in evidence that from that no judgment can be formed respecting the sea-damage, the knowledge of which can only be had from inspecting the bags. These defendants, then, do as is alleged in the third count—sell it as pimento not sea-damaged. There are, it is true, in that allegation the other general words, "of sound quality, and in good state and condition," but they do not seem to me so to vary the count as to prevent the plaintiffs from recovering on that count in a case where the defendants, upon selling sea-damaged pimento, have not made



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 Conner v. Robinson.
 

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the representation which is usually made by persons selling pimento of that description.

HEATH, J., concurred, and mentioned a trial before himself on the Home Circuit, in an action on the sale of some sheep sold as stock; and the evidence was that, by the custom of the trade, stock were understood to be sheep that were sound, and he directed the jury that it amounted to an implied warranty that they were sound, and that direction was never questioned, when the case afterwards came before the Court of King's Bench.

CHAMBRE, J., was of the same opinion.

GIBBS, J. — The justice of the case is with the plaintiffs, but I do certainly doubt whether the evidence meets any of the counts in the declaration. For, in all the counts it was stated either that the pimento was represented or warranted sound, or that it was put up to sale as of sound quality and in good state and condition, and not damaged. However, as my brothers think differently, I distrust my own opinion, and the rule must be discharged.

*Rule discharged.*

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 21. SAME — USAGE AS TO MEASUREMENT AND WEIGHT.

## CONNER v. ROBINSON.\*

*In the Court of Appeals of South Carolina, April, 1834.*

HON. DAVID JOHNSON, *President.*

“ JOHN B. O'NEALL, }  
 “ WILLIAM HARPER, } *Judges.*

A. purchased of B. a number of bales of cotton, at a certain price per pound. Several months prior to the sale the cotton had been weighed by the wharfinger, and marked on the bags and in the books at 63,043 pounds. When the cotton was delivered it was reweighed by A., and found to amount to only 61,205 pounds. A. thereupon paid B. for the cotton as of the latter weight, but refused to pay for more than he had actually received. In a suit by B. against A. for the difference, it was proved that, according to the custom of the trade, cotton was weighed by the wharfinger before it was put in store, and the weight marked on the bags and entered in books kept for that purpose, and that where a sale was made without any stipulation to the contrary, it was understood as being made upon the basis of the weights thus ascertained. *Held*, that A. was bound by the custom, and that B. was entitled to recover.

ASSUMPSIT. In May, 1831, the defendant purchased of the plaintiff 201 bales of cotton, at a certain price per pound. In the February pre-

\* Reported 2 Hill (S. C.), 354.

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ceding, the cotton had been weighed at public scales and put in store, and the weights entered on the scale-house books by the wharfinger, and according to these the 201 bales weighed in the aggregate 63,043 pounds. On the day of sale a bill of parcels was made out, and the weights taken from the wharf-books and an order for delivery given. When the cotton was delivered (which was on the same day), the defendant having some reason to believe that there was a deficiency in the weight, had it reweighed, and it was then ascertained that it weighed only 61,205 pounds, making in the aggregate a loss of 1,838 pounds, an average of about nine pounds to the bale. The defendant paid the plaintiff for the cotton according to its weight on the reweighing, at the rate agreed on, but refused to pay for any beyond that, and this action was brought to recover for the difference between the wharfinger weights and the weight on the reweighing.

The ground on which the plaintiff relied was that, according to the custom of trade, cotton is weighed by the wharfinger before it is put into store, and the weights marked on the bags and entered into books kept for that purpose; and when a sale is made, without a special contract to the contrary, it is understood as having been made with reference to the weights thus ascertained, and the bill of parcels is made out from these books. There was a great deal of evidence given in relation to this custom, both for and against it; the weight of the evidence, however, appeared to establish it.

His Honor charged the jury that if the parties contracted with reference to any particular custom, they must be controlled by it. If they did not understand each other, and one thought he had sold by the wharfinger's weight, and the other that he had a right to reweigh the cotton before it was shipped, then the contract must be governed by the laws of the land or the custom of trade. The law would not imply that one should pay for what he did not receive; as, if one were to go into a store and buy one hundred blankets, and take a bill of parcels, and it was ascertained before the blankets were taken away that he had but ninety, the mistake should be corrected or the purchaser would not be compelled to pay for but ninety. So of cotton. If a purchaser of cotton take a bill of parcels from the wharfinger's books, and it should be ascertained that the wharfinger had made a mistake, it ought to be rectified, and the purchaser compelled only to pay for the actual weight. When there is a gross difference, not arising from natural causes, actual weight should govern; but where the difference between the wharfinger's weight and a subsequent weighing arises from natural causes, the contract must be governed by the custom of the place. Whether

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such custom existed it was for the jury to determine, and if it did exist he would not regard it as unreasonable.

The jury found for the plaintiff on the ground, as stated in the verdict, that the defendant, in making the contract, made no stipulation for reweighing.

The defendant appealed, and now moves for a nonsuit or new trial, on the grounds (1) that the custom was not proved; and (2) if proved, it was unreasonable, and therefore bad.

*Dunkin*, for the motion. — *A priori*, a contract to pay a certain price per pound means according to the weight at the time. But it is alleged that the contract was made with reference to the scale-house books; or, in other words, it is claimed to substitute the wharfinger's weights for the true weights, by which an actual loss must accrue to the defendant; and custom, it is said, is to sanction this proceeding. A custom which will do this must be general, and have received the sanction of a court of justice, and been recognized as a part of the law of the land; a mere local custom cannot vary the terms of a contract.<sup>1</sup> A custom may be admitted to explain a contract when it is equivocal, but where the terms of a contract admit of no doubt, no custom can control them. The contract here was to pay a certain price per pound; there is nothing doubtful in this; a pound weight means nothing more or less than a pound weight, and no custom can vary its meaning.<sup>2</sup> A custom to receive bacon a little tainted, for good bacon, is not admissible.<sup>3</sup> As to the propriety of admitting custom to control the meaning of contracts.<sup>4</sup> A custom, to be good, must be reasonable; but it is unreasonable that one should be compelled to pay for what he never received, or more than he contracted to pay. It is usual to take the teller's count at bank, and to purchase goods by the manufacturer's mark; but it never was heard of, that if the teller made a mistake, or the manufacturer's mark was not correct, the receiver of the money or the purchaser of the goods would be bound. The example drawn from the sales of tobacco has no application, for that is not founded on custom, but is regulated by statute, providing a scale of shrinkage.<sup>5</sup> A custom may be so uniform and general that it may be supposed parties contract in reference to it; but here it seems doubtful whether such custom exists, some of the factors proving it, and others denying it and not acting under it.<sup>6</sup>

*King, contra*. — The plaintiff does not come here to enforce a contract

<sup>1</sup> *Thomas v. Clarke*, 2 Stark. N. P. 450; *Eddie v. East India Co.*, 2 Burr. 1216.

<sup>2</sup> *Homer v. Dorr*, 10 Mass. 26; *Yates v. Pym*, 6 Taun. 446.

<sup>3</sup> *Todd v. Reid*, 4 Barn. & Ald. 210.

<sup>4</sup> 1 Ph. on Ev. 434; *Anderson v. Pitcher*, 2

*Bos. & Pul.* 168; *Prescott v. Hubbell*, 1 McCord, 95; *Barksdale v. Brown*, 1 Nott & M. 519.

<sup>5</sup> 3 Brev. Dig. 89-90.

<sup>6</sup> *Trott v. Wood*, 1 Gall. 444; *Thomas v. Clarke*, 2 Stark. N. P. 450.

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contrary to law, but to compel the defendant to keep his contract; that was complete on the delivery of the order on the wharfinger, with the bill of parcels made out from the scale-books.<sup>1</sup> And the defendant purchased according to the bill of parcels received by him. According to the usage of trade which is established by the finding of the jury, the purchaser buys cotton with reference to the wharfinger's weights unless there is an express stipulation for reweighing. There is nothing unreasonable in this. Cotton loses or gains in weight according to circumstances, and the purchaser buying with reference to the scale-weights agrees to take the chance of loss or gain. All the witnesses prove the custom. The instances in which it has been departed from were by express contract. Nor is this a local custom. Charleston is a market for this and part of the neighboring States, and a custom affecting such interests is a general custom, and obligatory. The factors are the best judges of the interest and convenience of those concerned, and the court should not disturb them in the exercise of this right. Such a custom is good, and will control this contract.<sup>2</sup>

*Pettigru*, same side. — It was known to both parties that the cotton had been weighed by a wharfinger sworn to weigh correctly and impartially.<sup>3</sup> It never could have occurred to the seller that he was obliged to incur the expense of reweighing. All the witnesses concur in the existence of the custom, although it has not always been insisted on. We must suppose, then, that the defendant contracted with reference to it, and had the wharfinger's weights before him when he purchased, and consequently purchased according to those weights. The question really is, whether there was an implied warranty on the part of the seller that the cotton was full weight. The doctrine of warranty, however, does not apply to produce, when the purchaser, if he will, may ascertain the quantity.<sup>4</sup>

*Hunt*, in reply. — The contract was for so many bales of cotton, at a certain price per pound, and the question is, whether defendant is bound to pay for a greater number of pounds than he got. A custom that will establish his liability, if it is not unreasonable, and therefore bad, should be so well established and so long acquiesced in as to leave no doubt that the parties understood it and contracted with reference to it. It should be general<sup>5</sup> and of long standing, reasonable and universally acquiesced in.<sup>6</sup> The proof here is that only the factors acted on this

<sup>1</sup> *Searle v. Keeves*, 2 Esp. 598.

<sup>2</sup> *Renner v. Bank of Columbia*, ante, p. 116; *Smith v. Wright*, 1 Caines, 43; *Blundell v. Catterall*, 5 Barn. & Ald. 283; *Galloway v. Hughes*, 1 Bailey, 553.

<sup>3</sup> *City Laws*, 237, 248.

<sup>4</sup> *Carnochan v. Gould*, 1 Bailey, 179.

<sup>5</sup> *Chastain v. Bowman*, 1 Hill, 271.

<sup>6</sup> *Hayward v. Middleton*, 3 McCord, 121; *Rushforth v. Hadfield*, 6 East, 519.

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custom, and whenever it has been resisted by the purchaser it has either been abandoned or the contract has been broken off.<sup>1</sup>

JOHNSON, J. — The history of our jurisprudence abundantly shows that the law-merchant is for the most part made up of rules originally framed and acted upon by the merchants for their own convenience and the benefit of trade, which, with the sanction of the courts of justice, have become the settled law of the land, and as binding on the citizen as any other rule of law; and it is from this source that the rules for the interpretation of mercantile contracts are principally derived. Every trade, art, and profession has a language in some degree peculiar to itself, and it is only by reference to the general understanding of those who are accustomed to use it that we arrive at the meaning. For example, when a bill of exchange or promissory note is made payable on a certain day, one not conversant with mercantile usage would necessarily conclude that it meant what was expressed, and that the acceptor of the bill or the drawer of the note was bound to pay on the day specified; and it is only by reference to the understanding and usage of merchants that the days of grace are allowed in addition to all others. This process of law-making is perhaps the most unexceptionable. A rule prescribed by the Legislature is necessarily arbitrary, and it is out of the question to expect that every possible case upon which it may operate could be anticipated. It is liable, therefore, sometimes to operate injuriously, and it is only tolerated because it is productive of the greater good. Rules formed by usage are the work of time; they must be understood and acted upon by common consent before they become binding, and the opposing interest of those upon whom they operate is a sure guaranty that they will not be permitted to operate unequally.

The introduction of new articles of commerce, and any new source of enterprise which is opened to the merchants essentially different from those which have preceded, must give rise to customs and usages suited to their peculiar character; and as there are none more interested than those immediately concerned in the particular trade to establish those that are reasonable in themselves and precisely suited to the occasion, there is no reason why they should not be at liberty to prescribe rules for its government. These, it is true, have not the force of law until they have received the sanction of the courts of justice, and in that way become a part of the general law; but they are received as evidence, and serve to explain what was intended by the parties. Thus, though there be no express contract between the parties, yet it may be

<sup>1</sup> Bateson v. Green, 5 Term Rep. 412, note a.

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reasonably supposed that they meant to contract and deal according to the general usage, practice, and understanding (if there be anything peculiar) in relation to the subject-matter.<sup>1</sup>

To make a custom binding, three things only are necessary: First, that it should be general, so much so as to be generally known to those conversant with the particular trade; and that is not repelled by the ignorance of particular individuals, for every one will be presumed to be acquainted with the usages and practices of a trade in which he engages. Nor will it be vitiated by particular instances of a departure from it. It is every day's practice to pay notes and bills on the day on which they are made payable on their face, and no one ever thought that they deprived the payor of the days of grace if he thought proper to claim them. The second is, that it should be reasonable. On this subject CHEVES, J., says, in *Thomas v. O'Hara*,<sup>2</sup> that "he is at a loss to conceive of any usage in relation to a particular traffic which may not be proved, unless it be so clearly and palpably unreasonable and unjust, on the mere allegation of it, as to be void." And I take it that no usage can be considered as unreasonable unless it is calculated to operate unequally and fraudulently. The third is, that it must not violate any general rule of law.

With these general remarks, I will now proceed briefly to notice the evidence which was adduced on the trial. Without descending to particulars, it will be sufficient to remark, generally, that the facts established by the evidence on the part of the plaintiff show that for thirty years past, down to the present time, the general usage among the factors is, that when cotton arrives at the wharf dry and in good order, it is immediately weighed at the public scales, and the weight marked on each bag and entered in the scale-book, and if not then sold, is put in store. If not dry and in good order, it is exposed for the purpose of drying, and when, in the judgment of the wharfinger, it is sufficiently dried, it is then weighed and stored in like manner; that generally there is a loss in weight during the time it is in store, arising from evaporation, depending in quantity upon the time it remains in store and the part of the warehouse in which it is stored, that in the garret immediately under the tiles losing more, and that on the ground-floor less: and some instances were stated in which that stored on the ground-floor had gained instead of lost; that the usual loss of weight from this cause is four or five pounds to the bag, but when it is picked out of the field and packed early in the season a loss of ten pounds per bale would not be thought extraordinary; and the witnesses for the plaintiff, including some of the most respectable and experienced factors in the city, all concur in saying that sales

<sup>1</sup> *Savill v. Blanchard*, 4 Esp. 53; Doug. 519.

<sup>2</sup> 1 Mill Const. 148.



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are generally made with reference to the weights entered on the scale-book, and that the bills of parcels are made out from the entry on that book. Mr. Robinson, who had been engaged in the trade for thirty years; Mr. Magrath, who had been engaged for twenty-five years; and Mr. Ker Boyce, who had been engaged in the trade for seventeen years, and indeed all the witnesses for the plaintiff, concur in saying that it was a rule generally acted upon, and one from which they had never departed, except it was expressly stipulated for in the contract of sale.

On the part of the defendant, a number of witnesses of equal respectability and experience have testified against the custom; but, upon analyzing this evidence, I think it will be found that their evidence consists rather of deductions as to the equity of the custom than the fact of its non-existence. I will take, for example, the evidence of Mr. Calder, who is engaged in buying cotton. He says that it is a matter of mutual convenience to take cotton at the first weight, but he considers that the purchaser has a right, if he has any reason to suspect that the weight will not hold out, to ascertain the actual quantity by weighing at the time of the delivery, or at any time before it is taken from the wharf. In several instances he has required cotton to be reweighed, and the factor has made no difficulty; and, in his opinion, if the buyer requires, he has the right to reweigh. Now, this appears to me to be, so far as the fact is concerned, proof that the general habit is to take the cotton at the original weight, but that buyers occasionally require it to be reweighed, and it is submitted to by the factors. So of the evidence of Mr. Adger, another witness on behalf of defendant, who has had great experience both as a factor and buyer of cotton. He states that the practice of weighing cotton before it was put in store first originated in engagements to pay the freight on cotton by weight, and it was necessary to weigh it when received, to ascertain the amount of freight; that although cotton now pays freight by the bale, and that necessity no longer exists, yet the habit of weighing prior to storing has been continued for the convenience of the wharfinger. The difficulties in relation to this matter have induced this witness to instruct his wharfinger not to weigh his cotton until it is sold; and in his judgment the buyer has a right to as many pounds as he pays for, and that there is no custom which prevents the purchaser from ascertaining the weight. Now, as I understand this witness, he too proves that the general usage still is to weigh the cotton before it is stored, to which his own practice is an exception, — perhaps a solitary one, — and that the purchasers are generally content to buy according to these weights; but, according to his view of justice and morality, the purchaser ought to pay for no more than he has received.



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I think, therefore, that the fact of the existence of the general custom was one which, under the circumstances, fell most peculiarly within the province of the jury, and unless their conclusion was in opposition to the decided preponderance of the evidence, it ought to be decisive; and so far from this being the case, it strikes me as being in accordance with it; and I am equally well satisfied with the reasonableness of the custom. Upon a superficial view of the matter, one would very readily fall into the opinion entertained by the witnesses on behalf of the defendant, that it was unreasonable and unjust that a purchaser contracting to pay so much by the pound weight should be required to pay for a greater number of pounds than he received; but the legal presumption is that any one who embarks in a particular trade is acquainted with the nature of the article in which he deals, and the general usages of those who deal in it. We must, then, suppose that the defendant knew at the time he made the contract that cotton, when put in store, would generally lose in weight, depending for the quantum of the loss upon the part of the house in which it was stored, the season of the year in which it was picked and packed, and the time that it was in store; and that the general usage was to sell by the weight ascertained when it was stored, and from these *data*, which he might ascertain, he would be able to form a pretty correct estimate of the amount of the loss in weight. This would necessarily enter into the estimate of his offer to purchase, and it is his own fault if he makes an inconsiderate offer, for he is under no obligation to give what the seller may demand. This, too, is a view of one side of the case only. The seller has rights as well as the buyer. He also is presumed to know that cotton will lose in weight when in store, and that the scale-house weights generally represent the quantity as greater than would be found upon weighing; and it may well be supposed that he has on that account submitted to take less than he would have done if the precise weight had been before ascertained, and it would do injustice to him if he was compelled to submit to the loss which would be the probable result of weighing. This mode of ascertaining the quantity of an article of commerce is not peculiar to cotton. Flour, for instance, is habitually sold by the barrel, without stipulating that it shall contain a given number of pounds, and yet every one understands that it must contain one hundred and ninety-six pounds, because it is the usage to put that quantity in each barrel. The quantity of cloth, or other goods sold by the piece or package, is generally, nay almost universally, ascertained by the quantity stamped upon them, and it rarely occurs that the precise quantity is marked; and it never yet occurred to any one that if there should happen to be a fraction over, that the buyer should pay for it, or if a fraction under, the seller should

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make it good. And so of very many other articles which might be enumerated.

I think, too, that the proof establishes that the usage is for the convenience of the persons engaged in the trade, and operates as a benefit. When the trade is brisk, it is said that the same parcel of cotton sometimes passes through several hands in a short space of time, each seller calculating on a small profit, and sometimes submitting to loss; and if each buyer might, at his pleasure, demand that it should be reweighed, it is apparent that, besides the loss of time, the expenses must so diminish the profit or increase the loss as to put an end to this sort of traffic.

The interest which this case has excited has given to it some importance, and as establishing a rule for the construction of these contracts it deserves the consideration which has been bestowed upon it; but it belongs to that class of cases in which the parties have the right to make the laws of their own contracts, and whether the verdict of the jury or our view of the facts and the law be right or not, the community can suffer no injury. The buyer has the right to stipulate that the cotton shall be reweighed, unless he is satisfied to take it at the wharfinger's weights.

The usage, as proved, is understood to extend only to the loss of weight from natural causes, and not to such as arise from mistakes and frauds. These the seller would certainly be bound to make good, and it does strike me that the high average loss upon this cotton raises a pretty strong presumption that the loss here might, at least in part, have arisen from the presence of water, which was unobserved at the time it was weighed and stored, and which has subsequently evaporated; but that, too, was a question for the jury, who were no doubt more competent to judge of it than the court.

The motion must therefore be dismissed.

HARPER, J., concurred; O'NEALL, J., absent.

*Motion dismissed.*

## 22. SAME—INTEREST CHARGED BY CUSTOM.

### ESTERLY v. COLE.\*

*In the New York Court of Appeals, July, 1850.*

HON. GREENE C. BRONSON, *Chief Justice.*

" CHARLES H. RUGGLES,	} <i>Judges.</i>
" ADDISON GARDINER,	
" FREEBORN G. JEWETT,	

\* Reported 3 N. Y. 502.

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1. Where there is a general usage in any particular trade or business to charge and allow interest, parties having knowledge of the usage are deemed to contract with reference to it.
2. Although the law does not in general give interest upon an open running account for goods sold, yet an agreement to pay interest may be inferred from a uniform practice of the creditor to charge interest, known to the customer.

This was an action of *assumpsit* in the Supreme Court, brought by M. & P. Esterly against Cole, to recover the balance of an account of goods sold, etc. The plaintiffs were merchants at Medina, Ulster county, and the defendant, who resided in the vicinity, was their customer from 1837 to 1840. It was the practice of the plaintiffs to charge interest after six months on goods sold by them, and the referees before whom the cause was heard found from the evidence that this fact was known to the defendant. It was also proved that it was the general usage among merchants in that neighborhood to charge interest after six months on their accounts. The proof of this fact was objected to, but the objection was overruled. The referees reported in favor of the plaintiffs for the sum of \$1,144.03, including over \$400 for interest. The Supreme Court refused to set aside the report, and the defendant appealed to this court. A statement of the facts was entered in the record.

*R. W. Peckham*, for the appellant; *M. Schoonmaker*, for the respondent.

Bronson, C. J. — The plaintiffs are merchants, and have recovered interest after six months on an open running account for goods sold and delivered. The law does not give interest in such a case, and it can only be recovered where there was either a stipulated term of credit which has expired,<sup>1</sup> or an agreement, express or implied, to pay interest.

An agreement for interest may be inferred from the course of dealing between the parties — as, where interest has before been charged and allowed under the like circumstances; also, where the creditor has a uniform practice of charging interest, which was known to the customer at the time of the dealing. And where there is a general usage in any particular trade or branch of business to charge and allow interest, parties having knowledge of the usage are presumed to contract in reference to it; and if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. Knowledge of the usage may be established by presumptive as well as by direct evidence. It may be presumed from the fact that both parties are engaged in the particular trade or branch of business to which the usage relates, and also from other facts — as, the uniformity, long continuance, and notoriety of the usage.

<sup>1</sup> *Van Rensselaer v. Jewett*, 2 N. Y. 141.

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The facts found and stated in this case touching the question of interest are, that it was the practice of the plaintiffs and the general custom (usage) of merchants in the neighborhood to charge interest after six months, and that the defendant knew of the plaintiffs' custom (practice) to charge interest. This means, I presume, that he knew at the time of the dealing; and if he dealt with the plaintiffs, knowing their practice to charge interest, he must be deemed to have assented to the terms, and agreed to pay interest.

But it is said that there was not sufficient evidence from which to find the fact of knowledge. That is a question with which we, as an appellate court, have nothing to do. The court of original jurisdiction may set aside a report of referees when it is either against the weight of evidence or without sufficient evidence to support it, but an appellate court has no such power. Where the trial was before referees, error can only be brought on a case containing a statement of facts — not evidence — prepared and inserted in the record by the court of original jurisdiction. The case is in the nature of a special verdict, which leaves nothing for a court of review but the questions of law arising out of the facts thus stated. We cannot inquire whether the court below in the one case, or the jury in the other, has drawn the proper conclusions of fact from the evidence. The first instance of a review in an appellate court, where the trial was before referees, was *Reid v. Rensselaer Glass Factory*,<sup>1</sup> and it will be seen that the review was not had on the evidence before the referees, but on a statement of facts drawn up under the direction of the court below and incorporated in the judgment record. I will barely mention a few other cases touching the point of practice.<sup>2</sup> Several things are established by these authorities: *First*, that for the purpose of a review in an appellate court, a case containing a statement of facts — not the evidence before the referees, but the conclusions of fact drawn from that evidence by the court of original jurisdiction — must be settled by that court, so as to leave nothing for the appellate court but questions of law arising out of established facts. *Second*, this case must be inserted in the judgment record, with proper entries to show that the court below was moved to set aside the report of the referees, that the motion was denied, and judgment rendered against the complaining party. *Third*, if mere evidence is inserted in the case, the appellate court will not pass upon it. *Fourth*, the appellate court has no authority to review in any way the

<sup>1</sup> 3 Cow. 387; 5 Cow. 587.

<sup>2</sup> *Feeter v. Heath*, 11 Wend. 477; *Kaufman v. Copous*, 16 Wend. 478; *Melvin v. Long-*

*craft*, 17 Wend. 169; *The People v. Superior Court of New York*, 20 Wend. 663; *McPherson v. Cheadel*, 24 Wend. 15.

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settlement of the case in the court below, but must take the facts to be truly stated.

An objection to the admission of evidence remains to be considered. The plaintiffs, in addition to showing their own practice, proved that it was the general usage of merchants in that neighborhood to charge interest after six months. If this had been followed up with sufficient proof that the defendant knew the usage at the time he dealt with the plaintiffs, it would have made out a case for charging him with interest. As the usage might form a link in a chain of evidence going to charge the defendant, it was proper to hear it; and the decision of the referees in admitting it did not become improper because the plaintiffs failed to produce the further evidence which was necessary to give effect to the usage.

I understand the word "neighborhood," as used in the case, to mean the same town or place where the plaintiffs carried on business, and not a different town or place.

Although I should not be able to concur with the Supreme Court in finding from the evidence the fact that the defendant knew of the plaintiffs' practice to charge interest, yet as that fact is stated in the case, which we are bound to regard as properly settled, I see no error in point of law, and am of opinion that the judgment should be affirmed.

*Judgment affirmed.*

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 23. SAME — CUSTOM AS AFFECTING CHANGE OF POSSESSION.
 

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PRIESTLEY v. PRATT.\*

*In the English Court of Exchequer, January, 1867.*

Rt. Hon. Sir FITZROY KELLY, Kt., *Chief Baron.*

Sir SAMUEL MARTIN, Kt.,

" GEORGE WILLIAM WILSHERE BRAMWELL, Kt.,

" WILLIAM FRY CHANNELL, Kt.,

" GILLERY PIGOTT, Kt.,

} *Barons.*

Where a custom exists in a certain business for the buyer to leave goods bought by him in the hands of the seller, and it is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom do not, on the bankruptcy of the seller, pass to his assignee under the Bankruptcy Act.

TROVER, to recover from the defendants. the assignees in bankruptcy

\* Reported L. R. 2 Exch. 101.

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of R. Grant, lambs and pigs purchased by the plaintiff of the bankrupt before his bankruptcy.

At the trial before MELLOR, J., at the Lincolnshire Summer Assizes, it appeared that the lambs and pigs, together with two steers, were bought on the 10th of July, 1865. The plaintiff paid for the whole and removed the steers, but left the lambs, which were sucking, and the pigs on the bankrupt's farm until it should suit his convenience to remove them. On the 15th of July, Grant was made bankrupt on his own petition, and the assignees took and claimed to retain possession of the lambs and pigs as in his order and disposition at the time of the bankruptcy.

Evidence was offered of a custom, on the purchase of farm-stock, to leave the animals bought upon the seller's premises; but the jury interposed and said the evidence was unnecessary, for that there was a notorious usage and custom for the vendee of cattle to leave them in the hands of the vendor, for the convenience of the vendee, for a longer or shorter period, as might be arranged in each case.

Upon this, a verdict was taken for the plaintiff for £49, with leave to the defendants to move to enter a verdict for them, on the ground that the animals were in the order and disposition of the bankrupt at the date of his bankruptcy.

A rule having been obtained accordingly, *Wills* (*Digby Seymour*, Q. C., with him) showed cause. He contended that, as the jury had found as a fact that a notorious custom existed for the buyer to leave the animals bought in the hands of the seller, the case was within the decisions of *Re Terry*,<sup>1</sup> *Prismall v. Lovegrove*,<sup>2</sup> and *Watson v. Peache*.<sup>3</sup>

The court then called on *Field*, Q. C., to support the rule. He relied upon *Thackthwaite v. Cock*<sup>4</sup> and *Knowles v. Horsfall*.<sup>5</sup> and contended that a custom so alleged amounted to a general custom of England for buyers to leave goods in the hands of sellers until it suited their convenience to remove them. The case of *Watson v. Peache* was distinguishable on the ground that the bankrupt there was in the position of hirer of the barges, and a custom was proved to hire barges, and for the hirer to use them with his own name painted on them. It was not, therefore, as purchaser of the goods, but as the person letting them out to hire, that the defendant was there protected; but the present case was merely one of the purchase of goods, and, if decided in favor of the plaintiff, would almost have the effect of nullifying the reputed owners' clause in all such transactions.

<sup>1</sup> 7 L. T. (N. S.) 370.

<sup>2</sup> 6 L. T. (N. S.) 389.

<sup>3</sup> 1 Bing. N. C. 387.

<sup>4</sup> 3 Taun. 487.

<sup>5</sup> 5 Barn. & Ald. 134.



## Illustrative Cases.

KELLY, C. B. — This rule must be discharged. The question before us — and it is a question on which we have power to draw inferences of fact — is whether we are to hold, upon the evidence given at the trial, that these animals were in the order and disposition of the bankrupt, within the meaning of the Bankruptcy Act of 1849. That question depends in all cases on whether there is shown to exist, with respect to the articles in question, any custom of trade so notorious as practically to be known to all who do business with those dealing in such articles, and who are called upon to consider the question of giving credit to them, by virtue of which goods, in reality the property of others, are allowed to remain in the actual possession and physical power of disposition of the bankrupt. Looking at the circumstances of this case, it is difficult to imagine a stronger case of a notorious custom — notorious to all who are acquainted with the practice of farming. There is here no question of opposing evidence; but the jury themselves interpose in the course of the evidence, and say that the custom is so notorious as to make the evidence unnecessary. On this finding it must be taken that the custom was known to all who might be prejudiced by the apparent ownership, and that any one who was about to give credit to a farmer would not take it for granted that all the cattle he saw upon the farmer's land were his own, and give credit on that footing, but, conjecturing that they might be the property of others, would exercise a corresponding caution. Two cases were cited to us, of *Thackthwaite v. Cock* and *Knowles v. Horsfall*. The former of these is not an authority which could weigh for a moment as an argument against our present decision, for there was there no custom openly and expressly found by the jury to be notorious, but, on the contrary, as was observed by the chief justice,<sup>1</sup> there was no satisfactory evidence of a usage countervailing the operation of the statute. The case of *Knowles v. Horsfall* is stronger, and entitled to much consideration; but the decision is there put chiefly on the ground that there was no notice to the world, — nothing to induce persons to suppose or conjecture that the brandy in question might be the property of some other person than the bankrupt, — and that, to take the case out of the operation of the statute, some evidence must be given to satisfy the jury that the property may well be supposed to belong to some third person. It is to be observed that the learned judges in that case refer to the custom as known in the wine trade at Liverpool. They do not even speak of a custom, notorious in the trade generally, to leave goods purchased, for a greater or less time, in the hands of the vendor. We must, then, suppose that such a

<sup>1</sup> 3 Taun. 191.



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state of circumstances as we have before us was not present to their minds, or that the facts did not warrant the conclusion that there existed any such notorious custom as is here proved. If, however, we were to suppose such a notorious custom to have been satisfactorily proved, we should have to consider whether that decision is not opposed to the whole course of recent authority. Without relying on *Re Terry*,<sup>1</sup> in the Bankruptcy Court, although that case was decided by a very learned person, of great experience in this branch of the law, the case of *Prismall v. Lovegrove*,<sup>2</sup> in conformity with other modern cases, establishes that wherever a custom exists so notorious that it may be presumed to be known to all persons engaged in the business, that the buyer should leave the goods bought, in the hands of the seller for a certain time, and they are not left for a longer time than is clearly within the custom, they are taken out of the reputed ownership clause, and the buyer is entitled to recover them from the assignees in bankruptcy of the seller. The present case falls within that description, and the plaintiff is therefore entitled to recover.

FIGOTT, B. — I am of the same opinion. A notorious custom has been clearly found for the buyer to leave the animals bought in the possession of the seller; and that being so, it appears to me to fall exactly within the description given by MANSFIELD, C. J., in *Thackthwaite v. Cock*,<sup>3</sup> of the custom required to take goods out of the reputed ownership clause. It is "such a custom that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." As to *Knowles v. Horsfall*, I agree with the observations of the chief baron upon it; and I will add that, at the time when that case was decided, the struggle of the courts was rather to give as much as possible to the assignee than to discover the true owner.

*Rule discharged.*

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NOTES.

## I. BANKS AND BANKING, AND NEGOTIABLE AND ASSIGNABLE PAPER.

The effect of usage upon the laws of banking and negotiable and assignable paper is discussed lengthily by the Supreme Court of the United States in the leading case of *Renner v. Bank of Columbia*.<sup>4</sup> In many subsequent and earlier cases, similar and different usages have been offered in evidence to control the legal rules applicable to the particular facts and to alter the relations of the parties under the circumstances.

<sup>1</sup> *Supra*.

<sup>2</sup> *Supra*.

<sup>3</sup> 3 Taun. 491.

<sup>4</sup> 9 Wheat, 582, ante, p. 118.

## Powers of Officers.

§ 65. **Bank Officers — Powers of, as affected by Usage.** — The usage of banks in respect to the powers and duties of their officers, so far as such usage is known to the business public, enters into and qualifies the contracts made by such banks through their officers.<sup>1</sup> Where the usage is, that in the absence of the cashier the president signs drafts and checks, the signature of the president under such circumstances binds the bank.<sup>2</sup>

§ 66. **Same — Power to certify Checks.** — In *Mussey v. Eagle Bank*,<sup>3</sup> a case often criticised and rarely approved, it was held that the teller of a bank had no inherent and implied power, by virtue of his office, to certify checks as "good." And the court went further, and ruled that even if a usage on the part of the latter to certify was proved, it would not make the power inherent in the teller and would not alter the case. This was equivalent to holding that usage could not confer on an officer the power to bind the bank by certification — a doctrine at variance with all the other adjudications on the subject. While some of these expressly declare that in the office of cashier the power to certify checks is inherent, they all unite in the opinion that either cashier or teller may so act where it is the established custom so to do.<sup>4</sup> In a late New York case<sup>5</sup> it is said of *Mussey v. Eagle Bank*: "The decision was made over twenty years ago, and has not been repeated by the courts of Massachusetts, although the practice of using certified checks must have prevailed there as elsewhere. It has been repudiated in this and other States, and should not at this day be regarded as the law in Massachusetts, to override a general rule of construction based upon principles of the common law, of universal application."

Of equal authority to *Mussey v. Eagle Bank* is an early Louisiana case, where it was held that an unauthorized indorsement by the cashier of a bank of a note belonging to it could not be made effectual to protect the transferee by evidence of usage.<sup>6</sup>

§ 67. **Same — Proper Officer to receive Payments or Deposits.** — The custom of the bank may have much to do in protecting a depositor or one paying money to an officer of the bank. It is a matter of common knowledge that in large cities the duties of banking clerks and officers are, for the more speedy dispatch of business, circumscribed and different. There is a "receiving teller;" there is a "paying teller." A demand of the former would hardly bind the bank; a payment to the latter would, ordinarily, not be a payment to the bank.

<sup>1</sup> Whart. on Ag., § 676 (citing *Jones v. Fales*, 4 Mass. 245; *Widgery v. Munroe*, 6 Mass. 449; *Lincoln Bank v. Page*, 9 Mass. 155; *Blanchard v. Hilliard*, 11 Mass. 85; *Smith v. Whiting*, 12 Mass. 6; *Whitwell v. Johnson*, 17 Mass. 449; *City Bank v. Cutter*, 3 Pick. 414; *Hartford Bank v. Stedman*, 3 Conn. 489; *Yeaton v. Bank*, 5 Cranch, 52; *Brent v. Bank*, 1 Pet. 89; *Bank of Metropolis v. Bank*, 1 How. 234; *Pope v. Bank*, 57 N. Y. 131; *Stamford Bank v. Ferris*, 17 Conn. 272).

<sup>2</sup> Whart. on Ag., § 675 (citing *Neiffer v. Bank*, 1 Hend. 162; *Palmer v. Yates*, 3 Sandf. 137). The powers of officers of corporations

may be implied by usage. *Shimmel v. Erie R. Co.*, 5 Daly, 396.

<sup>3</sup> 9 Mete. 306.

<sup>4</sup> *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; *Willets v. Phoenix Bank*, 2 Duer, 121; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Clarke National Bank v. Bank of Albion*, 52 Barb. 592; *Merchants' Bank v. State Bank*, 10 Wall. 604.

<sup>5</sup> *Cooke v. State National Bank*, 52 N. Y. 96; 50 Barb. 339.

<sup>6</sup> *United States Bank v. Fleckner*, 8 Mart. (La.) 309; 13 Am. Dec. 387.

## Banks and Banking.

itself. But it is obvious that the practice of the bank itself in former instances might well be shown in order to render valid and binding upon it a payment under other circumstances not valid and binding. Mr. Morse, in his excellent treatise, thinks that isolated cases of a contrary practice should not affect the rule; that solitary instances of payments of funds to another officer than the one authorized to receive them are impotent to alter established principles. But Mr. Morse favors the harsh rule which requires the deposit or payment to be made to the proper officer at the customer's peril, and which several adjudicated cases sustain.<sup>2</sup> In one of these cases the court say: "This is confessedly a hard case, but such cases will continue to present themselves until men shall act upon the maxim, 'Do what you ought, happen what may.'" And of the remaining three, two at least have been practically overruled by *East River National Bank v. Gove*,<sup>3</sup> where a better doctrine is announced by the New York Court of Appeals: "Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank, in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected, and the bank must be bound by the payment." In the light of this authority, it can hardly be doubted that any evidence of the custom of other officers under such circumstances would be conclusive.

And the question whether a transfer of shares to a cashier vests the legal title thereto in the bank,<sup>4</sup> may be made plain by proof of usage.<sup>5</sup>

§ 68. Banks — Negotiable Paper — Usage as to Demand and Notice. — The usages of banks as to demand and notice govern<sup>6</sup> and make valid acts otherwise invalid — as, a notice by mail where the party lives in the same town and where, in the absence of such a usage, the notice would be insufficient;<sup>7</sup> or a notice on a day earlier or later than the legal day;<sup>8</sup> or a demand of payment on

<sup>1</sup> Morse on Banks, 51.

<sup>2</sup> *Manhattan Co. v. Lydig*, 4 Johns. 377; *Thatcher v. Bank*, 5 Sandf. 121; *Sterling v. Marietta, etc., Trading Co.*, 11 Serg. & R. 179; *Terrell v. Branch Bank*, 12 Ala. 502.

<sup>3</sup> 57 N. Y. 597.

<sup>4</sup> *New England Marine Ins. Co. v. Chandler*, 16 Mass. 275; *Fairfield v. Adams*, 16 Pick. 381.

<sup>5</sup> *Stamford Bank v. Ferris*, 17 Conn. 259.

<sup>6</sup> *Hartford Bank v. Stedman*, 3 Conn. 489; *Bowen v. Newell*, 5 Sandf. 326; *Lewis v. Planters' Bank*, 3 How. (Miss.) 267; *Planters' Bank v. Markham*, 5 How. (Miss.) 397; *Commercial, etc., Bank v. Hamer*, 7 How. (Miss.) 448; *Warren Bank v. Parker*, 8 Gray, 221; *Halls v. Howell, Harp.* 427; *Boston Bank v. Hodges*, 9 Pick. 420; *Godden v. Shipley*, 7 B. Mon. 579; *Widgery v. Munroe*, 6 Mass. 449; *Lincoln, etc., Bank v. Page*, 9 Mass. 155; 6 Am. Dec. 52; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Cohea v. Hunt*, 2 Smed. & M. 227;

*Kilgore v. Bulkley*, 14 Conn. 367; *Haywood v. Pickering*, L. R. 9 Q. B. 428; *Isham v. Fox*, 7 Ohio St. 317; *Trask v. Martin*, 1 E. D. Smith, 505. But see *Bank of Alexandria v. Deneale*, 2 Cranch C. Ct. 488; *Jackson v. Union Bank*, 6 Har. & J. 416.

<sup>7</sup> *Chicopee Bank v. Eager*, 9 Mete. 584; *Gindrat v. Mechanics' Bank*, 7 Ala. 325; *Grinnan v. Walker*, 9 Iowa. 426; *Beil v. Hagerstown Bank*, 7 Gill, 227.

<sup>8</sup> *Forbes v. Omaha National Bank*, 11 Cent. L. J. 209; *Ireland v. Kip*, 10 Johns. 490; s. c. 11 Johns. 231; *Sheldon v. Benham*, 4 Hill, 129; *Ransom v. Mack*, 2 Hill, 587; *Shelburne Falls National Bank v. Townsley*, 102 Mass. 177; *State Bank v. Kowell*, 6 Mart. (N. S.) 267.

<sup>9</sup> *Blanchard v. Hilliard*, 11 Mass. 85; *Jones v. Fales*, 4 Mass. 245; *Pierce v. Butler*, 14 Mass. 303; *Wood v. Corl*, 4 Mete. 203; *Taunton Bank v. Richardson*, 5 Pick. 436.

## Demand and Notice.

the fourth, instead of the third day after due;<sup>1</sup> or on the day previous to what is not a legal holiday;<sup>2</sup> or an incorrect description in the notice;<sup>3</sup> or a demand on the maker without presenting the note to him;<sup>4</sup> or at the bank where negotiated, and not on the indorser personally;<sup>5</sup> or a notice intended for a director, but left at the bank upon the cashier's desk.<sup>6</sup> And the usage of depositors in certain banks to deposit checks on the same or the next day after the day on which they were received, and of the bank immediately to return any checks from the "clearing-house" which the bank has not funds to cover, is recognized.<sup>7</sup>

§ 69. **Same—Demand always necessary.**—But though a demand may be made on the fourth day instead of the third, or earlier than the third, if in accordance with custom, it is nevertheless necessary, it would seem, that a demand be made then; and the omission of this requisite cannot be excused by usage. Thus, in a Maryland case,<sup>8</sup> a witness testified that he served on the drawer a written notice in the usual form, stating when the note was due and must be paid, and that he left the notice with the drawer, as was the custom in such cases. But the Court of Appeals held that this was not sufficient. "It is supposed," said ARCHER, J., "that this language of the witness constitutes evidence of a usage on the part of the bank to make demand of payment at a time and under circumstances different from the general rules of law, and that efficiency should be given to such usage, if found by the jury, so as to validate as a demand that which without such a usage would be a nullity. In the view which we take of the evidence, it is immaterial to examine the question as to the legal effect of such usage, if established, because we consider that the witness proves no usage bearing on the question of a demand. The only conclusion which can be drawn from the evidence is, that it is the practice of this bank, as it is of all banks, to give notice of the falling due of notes, that the parties may be apprised not only of the holders of the notes, but reminded and admonished of the near approach of the time for the payment of their liabilities. The witness does not state the existence of any usage to treat this common notification as a substitute for a legal demand on the holder. The rule established is, on the contrary, perfectly consistent with the necessity of presentment for payment when due, and in the accustomed legal mode. \* \* \* The plaintiff should have gone farther, and proved that, by the usage of the bank, demands against the drawers of notes, in order to charge the indorsers, were always made by the alleged notification on the day notes first fell due, instead of being made according to the rules of law, and that such notice was by usage a substitute for the lawful demand. In such a state of facts, the question would have been brought before the court how far, in point of law, such a notice could operate as a

<sup>1</sup> Bank of Columbia v. Magruder, 6 Har. & J. 172; Bank of Columbia v. Fitzhugh, 1 Har. & G. 239; Patriotic Bank v. Farmers' Bank, 2 Cranch C. Ct. 560; Bank of Washington v. Triplett, 1 Pet. 25; Mills v. Bank of the United States, 11 Wheat. 431; Raborg v. Bank of Columbia, 1 Har. & G. 231.

<sup>2</sup> City Bank v. Cutter, 3 Pick. 414.

<sup>3</sup> Smith v. Whiting, 12 Mass. 6.

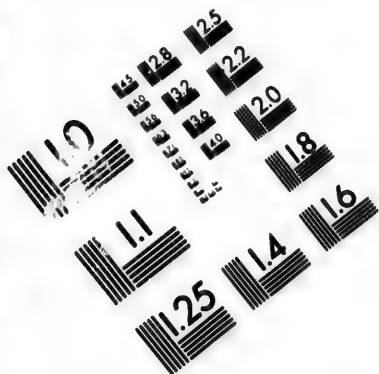
<sup>4</sup> Whitwell v. Johnson, 17 Mass. 449.

<sup>5</sup> Brent v. Bank of the Metropolis, 1 Pet. 89.

<sup>6</sup> Weld v. Gorham, 10 Mass. 366. And see Hotchkiss v. Artisans' Bank, 42 Barb. 517.

<sup>7</sup> Marrett v. Brackett, 60 Me. 524. And see Overman v. Hoboken City Bank, 30 N. J. L. 61.

<sup>8</sup> Farmers' Bank v. Duvall, 7 Gill & J. 78.



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## Negotiable Paper.

demand."<sup>1</sup> And where due presentment according to law has been made, a mercantile usage to make it in a different way is irrelevant.<sup>2</sup>

§ 70. **Same — Discordant Decisions.** — There are some cases which seem, at first glance, to conflict with the rule that the customer is presumed to agree to the usages of the bank.<sup>3</sup> *Piscataqua Exchange Bank v. Carter*,<sup>4</sup> decided in New Hampshire in 1850, and *Central Bank v. Davis*,<sup>5</sup> which arose in Massachusetts in 1873, were alike both in facts and result. To a suit against the indorser of a note, the reply was that no notice or demand had been given as required by law. It appeared, however, that it was the well-known usage of the bank to require the indorser, in such cases, to make demand and notice *on the note*. No such written waiver appeared on the note, and it was held that the usage could not prevail. The court said that parol evidence of usage was not admissible for the purpose of varying the written contract of indorsement, and also that the usage proved, being a usage for the customer to make a certain agreement, could not affect a transaction in which such an agreement had not been made. Upon the second ground the decision in these cases may be sustained, but not upon the first, which is equivalent to saying that a usage cannot add to a written contract.

§ 71. **Usage and Days of Grace.** — All bills of exchange or negotiable notes not payable instantly are entitled to days of grace.<sup>6</sup> A check, being payable on demand, is, therefore, not entitled to grace.<sup>7</sup> It has sometimes been attempted to alter this rule by evidence of a different custom. In *Woodruff v. Merchants' Bank*,<sup>8</sup> the paper was in this form: —

"\$1,500.

DETROIT, November 15, 1838.

"Sixty days after date, pay to the order of Daniel Green, Esq., fifteen hundred dollars, at the Phoenix Bank in the city of New York, value received, which please to account.

"Your ob'd't serv't,

L. GODDARD, Detroit, Mich.

"To Wm. H. Griswold, Esq., cashier Oakland County, Michigan."

It was contended that according to the custom of bankers and merchants in New York this was a check, and was not entitled to the days of grace allowed on promissory notes and bills of exchange. But the Supreme Court said: "The effect of the proof of usage as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper."

In *Morrison v. Bailey*,<sup>9</sup> the paper was in this form: —

"\$300.

CLEVELAND, O., June 30, 1853.

"Wicks, Otis & Brownell: Pay to L. F. Burgess on the 13th day of July, '53, or order, three hundred dollars.

R. B. BAILEY."

<sup>1</sup> See also *Borup v. Nininger*, 5 Minn. 523.

<sup>2</sup> *Kleekamp v. Meyer*, 5 Mo. App. 444.

<sup>3</sup> See *ante*, Chap. I., § 23.

<sup>4</sup> 20 N. H. 246.

<sup>5</sup> 19 Pick. 373.

<sup>6</sup> *Brown v. Harraden*, 4 Term Rep. 148; *Cook v. Darling*, 2 R. I. 385; *Brown v. Lusk*, 4

Yerg. 210; *Daniels v. Kyle*, 1 Kelly (Ga.), 304; *Woodruff v. Merchants' Bank*, 25 Wend. 673.

<sup>7</sup> *Dan. Neg. Inst.* 507.

<sup>8</sup> 25 Wend. 673.

<sup>9</sup> 5 Ohio St. 13.



## Duties of Collecting Agents.

The testimony of a number of bankers showed a uniform custom on their part in Cleveland to regard drafts in this form as checks, and not entitled to days of grace. But the Supreme Court of Ohio, following *Woodruff v. Merchants' Bank*, held that "any supposed usage of banks in any particular place to regard drafts upon them, payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of law."<sup>1</sup> On the other hand, in Pennsylvania it is held that in order to carry out the understanding of the business community, evidence of such usage should be admitted.<sup>2</sup>

§ 72. **Duties of Bank as Collecting Agent.**—A bank receiving a check for collection has, according to the general common-law rule, until the close of banking-hours on the next business-day in which to present it.<sup>3</sup> But it is clear that a general usage to present it within a shorter or a longer time would qualify this rule,<sup>4</sup> provided it were general and well understood.<sup>5</sup>

A custom among banks of transmitting bills and notes from each to the other for collection, and when paid, of passing the proceeds to the credit of the bank so transmitting them, and to the debit of the bank so receiving them, cannot affect the claim of a third person to the proceeds of a bill which he has committed to one of them for collection.<sup>6</sup> Whether, when a note is sent to a bank for collection, the duty of making a demand on the maker can be delegated by it to a notary so as to relieve the bank from all subsequent responsibility, is a question upon which have arisen diverse rulings. In New York it has been held that the bank remains responsible;<sup>7</sup> in Pennsylvania and Louisiana, that if the bank has exercised proper care in the selection, its liability is at an end;<sup>8</sup> in Massachusetts, proof of a usage of business on the part of the bank is considered to settle the question;<sup>9</sup> while in New York no contrary usage can affect the bank's liability in such cases.<sup>10</sup> And though a bank to whom a note is sent for collection need not, as a matter of law, notify all the indorsers,<sup>11</sup> yet such a duty may be cast upon it by usage and custom.<sup>12</sup> The rule that where commercial paper is placed in a bank for collection the title thereto does not pass to the bank, nor does it become the customer's debtor for the amount until the collection is made, is not affected by a practice of the bank allowing customers to draw against such deposits before

<sup>1</sup> But see *Bowen v. Newell*, 13 N. Y. 290; *Lawson v. Richards*, 6 Phila. 179; *Champion v. Gordon*, 70 Pa. St. 476; *Minturn v. Fisher*, 4 Cal. 35.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Rickford v. Ridge*, 2 Camp. 537; *Moule v. Brown*, 4 Bing. N. C. 268; *Boddington v. Schlenker*, 4 Barn. & Adol. 752; *Alexander v. Burchfield*, 7 Man. & G. 1061; *Hare v. Henty*, 10 C. B. (N. S.) 65.

<sup>4</sup> *Boddington v. Schlenker*, 4 Barn. & Adol. 752; *Morse on Banks*, 333.

<sup>5</sup> *Rickford v. Ridge*, 2 Camp. 537; *Mohawk Bank v. Broderick*, 13 Wend. 133.

<sup>6</sup> *Lawrence v. Stonington Bank*, 6 Conn. 521.

<sup>7</sup> *Allen v. Merchants' Bank*, 22 Wend. 215.

<sup>8</sup> *Baldwin v. Bank of Louisiana*, 1 La. An.

13; *Bollemlire v. Bank of the United States*, 4 Whart. 103.

<sup>9</sup> *Warren Bank v. Suffolk Bank*, 10 Cush. 582.

<sup>10</sup> *Ayrault v. Pacific Bank*, 47 N. Y. 570.

<sup>11</sup> *Haynes v. Berks*, 3 Bos. & Pul. 599; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Branch Bank v. Knox*, 1 Ala. 148; *Phipps v. Millbury Bank*, 8 Mete. 79; *Colt v. Noble*, 5 Mass. 167; *Eagle Bank v. Chapin*, 3 Pick. 180; *Bank of the United States v. Goddard*, 5 Mason, 366; *State Bank v. Bank*, 41 Barb. 343; *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263; *Bank of the United States v. Davis*, 2 Hill, 451; *Spencer v. Ballou*, 18 N. Y. 327; *Farmers Bank v. Vail*, 21 N. Y. 485.

<sup>12</sup> *Smedes v. Bank of Utica*, 20 Johns. 372; 3 Cow. 362.

## Banks and Banking.

the collections have actually been made.<sup>1</sup> A bank acting as the collecting agent of another has no right to receive in payment anything but money. If, instead of money, it takes a check and surrenders the paper, it assumes the responsibility of the paper becoming good, and if it turns out otherwise it is liable. But it may prove as a defence a usage to act in this manner,<sup>2</sup> though Mr. MORSE says: "It may be doubted whether it would free a banker from liability if he should simply show a frequent habit of parting with paper upon receiving the check of the debtor, or whether he would not have to go further, and show positively that it was understood in all such transactions that the banker discharged his full duty to the customer by so doing."<sup>3</sup>

§ 73. **Payment by Bank must be in good Money — Usage.** — Where a bank receives a sum on a general deposit, it is bound to respond to the depositor, when called on, for a like sum in good money. "This," says Mr. MORSE, "has been repeatedly held in the Western States, where bank-bills of the so-called 'wild-cat' banks were deposited and credit given for the nominal value in dollars and cents. Frequently, the depreciation of these bills had begun at the time of deposit; often they had sunk almost immediately afterwards, through every stage of depreciation, to utter worthlessness. But the courts uniformly held that the credit given for so much money could only be discharged by so much money, and that bills similar to those received, or even the identical ones, could not be forced upon the customer in payment."<sup>4</sup> So, where the deposit was made in bills of the bank itself, and they were at the time greatly depreciated, it was held that payment must nevertheless be made in full in good money.<sup>5</sup> In *Marine Bank of Chicago v. Chandler*,<sup>6</sup> the defendant asked the following instruction, which was refused: "If the jury believe from the evidence that it is the usage and custom of banks and bankers to mingle all the funds received by them in a common mass, and that according to such usage the defendant mixed the funds received on account of plaintiff with its own, and that its own funds, with which plaintiff's were mingled, were composed of the notes of the banks of Illinois received by it in its ordinary course of business for itself and its customers, which were afterwards depreciated in value from causes not within defendant's control, then the loss by such depreciation in defendant's funds must fall on him." In affirming the ruling and verdict below, WALKER, J., said: "Nor can the special custom of banks in a particular locality change the laws of the land regulating the value of the currency and fixing the standard value of the current coins. That parties may contract to receive any commodity in lieu of money, in payment of indebtedness, is undeniably true. This can only be done by special agreement, and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of a particular place have been in the habit of receiving depreciated paper money in payment of their demands by no means proves that all creditors in

<sup>1</sup> *Giles v. Perkins*, 9 East, 12; *Scott v. Ocean Bank*, 23 N. Y. 289.

<sup>2</sup> *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Levy v. National Bank*, 7 Cent. L. J. 249.

<sup>3</sup> *Russell v. Hankey*, 6 Term Rep. 12; *Levy v. National Bank*, *supra*.

<sup>4</sup> *Morse on Banks*, 120.

<sup>5</sup> *Id.* 52.

<sup>6</sup> *Corbitt v. Bank of Smyrna*, 2 Harr. (Del.) 235; *Marine Bank v. Rushmore*, 24 Ill. 463; *Fort v. Bank of Cape Fear*, 1 Phil. L. 417; *Marine Bank v. Ogden*, 29 Ill. 248; *Willett v. Paine*, 43 Ill. 433.

<sup>7</sup> *Bank of the Commonwealth v. Wister*, 2 Pet. 318.

<sup>8</sup> 27 Ill. 526.

## Payment

that locality have agreed to receive the same, much less a person residing hundred of miles distant. To have such an effect, a special agreement must be proved.<sup>1</sup> So, in *Thompson v. Riggs*,<sup>2</sup> the plaintiff had for a series of years deposited coin and paper money with the defendant, a banker. Coin at the time had one value, and paper money another and less value, and the different deposits were entered in his pass-book as "coin" and "paper" respectively. Debts being at this time payable in "coin" only, the banker requested the plaintiff to make his full balance coin, which was done. Subsequently an act was passed making certain treasury-notes lawful money for the payment of debts. The plaintiff continued depositing "coin" and "treasury-notes," then regarded as currency, and both were entered accordingly. He afterwards drew for "coin" the bulk of his coin balance deposited before the act. Coin was refused, and tender made of treasury-notes. In an action brought for the market value of the coin drawn for, the teller of the bank having testified that after the act making treasury-notes a legal tender his employer uniformly made with customers depositing with them a difference, in receiving and paying their deposits, between coin and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise treasury or bank notes, the plaintiff offered evidence to show that the usage and mode of dealing between the said parties as stated by the teller was the usage of all the banks in that place. This evidence was considered in the Supreme Court of the United States as properly rejected. "The general rule of law is," said Mr. Justice CLIFFORD, "that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control the general rule of law, as it is not pretended that the evidence showed a special deposit or any special contract. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible as tending to control the well-settled rules of law."<sup>3</sup>

**§ 74. Same—Payment of forged Check.**—In regard to the payment by a bank of a forged check, the general rule is that the banker, being bound to know the signature of his customer, will make such a payment at his peril.<sup>4</sup> How far this rule may be affected by usage is shown by the Ohio case of *Ellis v. Ohio Life Insurance and Trust Company*.<sup>5</sup> On the trial, evidence was introduced of a custom at that place for the cashier or teller of a bank to whom a check drawn

<sup>1</sup> See also *Marine Bank v. Birney*, 28 Ill. 90; *Chicago, etc., Ins. Co. v. Carpenter*, 28 Ill. 369.

<sup>2</sup> 5 Wall. 663.

<sup>3</sup> See also *Chesapeake Bank v. Swain*, 20 Md. 483.

<sup>4</sup> *Price v. Neale*, 3 Burr. 1355; *Jenys v. Fowler*, 2 Stra. 946; *Wilkinson v. Lutwidge*, 1 Stra. 648; *Barber v. Gingell*, 3 Esp. 60; *Smith v. Chester*, 1 Durnf. & E. 655; *Bass v. Olive*, 4 Moo. & S. 13; *Forster v. Clements*, 2 Camp. 17; *Smith v. Mercer*, 6 Taun. 76; *Young v. Adams*, 6 Mass. 157; *Markle v. Hatfield*, 2 Johns. 462; *Gloucester Bank v. Salem Bank*,

17 Mass. 33; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Weisser v. Denison*, 10 N. Y. 68; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333; *Commercial, etc., Bank v. First National Bank*, 30 Md. 11; *First National Bank v. Ricker*, 71 Ill. 433; *Bernheimer v. Marshall*, 2 Minn. 78; *Levy v. Bank of the United States*, 4 Dall. 234. *Contra*, *National Bank of America v. Bangs*, 106 Mass. 441.

<sup>5</sup> 4 Ohio St. 628.

## Banks and Banking.

upon another bank was presented, and payment or purchase requested by an unknown bearer, to take means to assure himself that all was right, and for the drawee bank, upon receiving a check through another bank, to assume, relying upon the custom, that such inquiries had been made. The jury having found for the drawee bank, the Supreme Court affirmed the judgment. "If this custom," said RANNEY, J., "was established to the satisfaction of the jury, the fair presumption arising would be that the defendants had been negligent in failing to comply with an established custom of the business, necessary not only to their own security, but also to that of the bank upon which the check was drawn, and that the plaintiffs, not being informed to the contrary, paid the check upon the supposition that the custom had been observed. \* \* \* The custom which the plaintiffs sought to establish seems to have been one of the most reasonable character. It is a great error to suppose that the drawee of a bill or check is bound to rely alone upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself and of his right to the paper. But when another bank intervenes and takes the check, this cannot be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution." But in a Connecticut case, where a bank had discounted a note which had been altered by erasing a portion of the printed part, it was claimed in its behalf that it was customary for banks to discount paper written on printed blanks, where the printed matter or some part of it had been erased, and that such an erasure of printed matter did not of itself cast suspicion on the paper or put the bank itself on inquiry. But this contention did not find favor with the court.<sup>1</sup>

In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the word "certified," at the time of the certification, when used in the certification of checks, imported an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, was held inadmissible.<sup>2</sup>

**§ 75. Note voluntarily cut in Two—Usage to pay only Half.**—Where the holder of a bank-bill has voluntarily cut it in two for the purpose of transmitting it by mail, whereby one part is lost, he may recover the full amount from the bank upon presenting the one half and proving the loss of the other.<sup>3</sup> A custom on the part of the bank not to pay any of its bills voluntarily cut in

<sup>1</sup> *Mahative Bank v. Douglass*, 31 Conn. 170.

<sup>2</sup> *Security Bank v. National Bank*, 67 N. Y. 458.

<sup>3</sup> *Allen v. State Bank*, 1 Dev. & B. Eq. 3; *Union Bank v. Warren*, 4 Sneed, 167; *Bank of Virginia v. Ward*, 6 Munf. 166; *Armat v. Union Bank*, 2 Cranch C. Ct. 180; *Bullet v.*

*Bank of Pennsylvania*, 2 Wash. C. Ct. 172; *Martin v. Bank of the United States*, 1 Wash. C. Ct. 253; *State Bank v. Aersten*, 4 Ill. 135; *Hinsdale v. Bank of Orange*, 6 Wend. 378; *Patton v. State Bank*, 2 Nott & M. 464; *Commercial Bank v. Benedict*, 18 B. Mon. 307.

## Payment of Bills.

two, except on the production of both parts, cannot affect this rule.<sup>1</sup> So of a usage to pay but half the amount of the note on the presentation of each half. In *Allen v. State Bank*,<sup>2</sup> the plaintiffs alleged that they were partners, and that one of them, having received a number of the defendants' bank-bills in the collection of debts due the firm, for the purpose of securing their safe transmission to the other, cut each of them into two parts, and enclosed the first halves on one day and the other halves on another day in letters by the public mail; that the first parcel came duly to hand, but that the second was lost; that, as soon as the loss was ascertained, they presented to the defendants the halves received, offered indemnity against any loss by reason of the missing halves, and demanded payment of the whole amount of the bills; that the defendants paid them one-half of the sum, but refused to pay more. The bill prayed that the defendants might be required to pay the balance. The defendants replied, *inter alia*, that it was their custom to pay the holder of a half-note, on presentation at their counter, one-half of the amount of the note, which custom was known to their dealers, and particularly to the plaintiffs; that this custom was adopted from regard to public convenience, and not upon a supposition of their liability, for they contended that no liability could be enforced except on the presentation of the entire note. The court decreed for the plaintiffs. "While the 'two parts exist,' said GASTON, J., "and are retained by the lawful holder, the rights and liabilities of the parties remain precisely the same as before the division. If one of the parts be afterwards lost or destroyed, the right of the former holder of the note and the obligation of the maker are the same as though the whole note had been destroyed. Had the notes in this case been put into the mail in their original state, and then the loss occurred, it might with equal plausibility have been urged that the plaintiffs, for their own convenience, took upon themselves the risk of loss, and can therefore demand payment only according to the letter of the engagement. If the law warranted such a usage as that alleged by the defendants, of paying upon a half-note, by whomsoever presented, half the amount of the note, the risk of injury to the one or other of the parties would be the same in the transmission by mail of a divided as of a whole note. In the former case there would be indeed a double chance of casualties, but only a danger of half a loss upon each casualty. Such a usage, however, is wholly unsupported by law. The holder of a half-note, as such, has no right to any part of the money. Such a usage has a pernicious tendency to facilitate the receipt of money by the dishonest holders of half-notes, and thereby creates or multiplies temptations to dishonesty. The transmission of divided notes by several mails diminishes the danger of injury as to one of the parties and does not increase it as to the other, is for the benefit of commerce, affords additional security against dishonesty by lessening the inducement to commit it, and ought in no manner to affect the rights of the lawful owners of the notes."

§ 76. **Bank — Bona fide Holder.** — Evidence of usage is competent to show that a bank which in good faith receives a check from a depositor and passes it to his credit, and on the same day pays and charges against such deposit checks drawn by him, is a *bona fide* holder for value of the deposited check.<sup>3</sup>

<sup>1</sup> *Bank of the United States v. Still*, 5 Conn. 106; 13 Am. Dec. 44.

<sup>2</sup> 1 Dev. & B. Eq. 3.

<sup>3</sup> *Market Bank v. Hartshorne*, 3 Keyes, 137; *National Gold & Trust Co. v. McDonald*, 51 Cal. 64.

## Common Carriers.

§ 77. **Past-due Negotiable Paper — Equities.** — The purchaser of negotiable paper past due takes it subject to the equities of other parties; he can acquire no better title than his transferor.<sup>1</sup> In *Vermilte v. Adams Express Company*,<sup>2</sup> a usage of brokers in opposition to this rule of law was set up, but without success. A number of United States treasury-notes which had been stolen from the express company were purchased by a firm of bankers after the date at which, on their face, they were payable or convertible into bonds. It appeared that the company, after the loss, had been prompt in giving warning of the theft by advertising in the newspapers and delivering notices to the principal brokers, including the defendants. The latter introduced evidence to show that notes of the kind in question continued to be bought and sold by bankers and brokers after they had become due; that it was not customary for dealers in government securities to keep records or lists of the numbers or descriptions of bonds alleged to have been lost, stolen, or altered, or to refer to such lists before purchasing such securities; that it would be impracticable to carry on the business of dealing in government securities if it were necessary to resort to such lists and make such examination previous to purchase; and that the purchase of the notes in question was made in the ordinary and usual mode in which such transactions are conducted. It was held by the Supreme Court of the United States that, as to such overdue paper, a purchaser takes subject to the rights of an antecedent holder, to the same extent as in the case of other paper bought after maturity, and that the notes could be recovered of the defendants. "Bankers, brokers, and others," said Mr. Justice MILLER, "cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law."

A note not negotiable under the general commercial law may be shown to be so by the custom of a particular locality.<sup>3</sup>

## II. COMMON CARRIERS.

§ 78. **Liabilities of Carriers created by Custom.** — A common carrier is one who undertakes, for hire, to transport the *goods* of such as choose to employ him, from place to place.<sup>4</sup> But the transportation of goods, as was said by Judge STORY in an early case,<sup>5</sup> does not imply that the owner holds himself out as a carrier of articles of a different nature. Yet common carriers may undertake to carry other kinds of property, and if it is their custom to do so, they will be

<sup>1</sup> *Texas v. Hardenburg*, 10 Wall. 68; *Marsh v. Marshall*, 53 Pa. St. 396; *Kellogg v. Schmauke*, 56 Mo. 137; *Davis v. Miller*, 14 Gratt. 1; *Arents v. The Commonwealth*, 18 Gratt. 750; *Fisher v. Leland*, 4 Cush. 456; *Clarke v. Dederick*, 31 Md. 148; *Merrick v. Butler*, 2 Laus. 103; *Livermore v. Blood*, 40 Mo. 48; *Barker v. Valentine*, 10 Gray, 341; *Flint v. Flint*, 6 Allen, 34; *Thomas v. Kinsley*, 8 Ga. 421; *Fields v. Stunston*, 1 Coldw. 40; *Diamond v. Harris*, 33 Texas, 634; *Barrrough*

*v. Moss*, 10 Barn. & Cress. 558; *Kittle v. De Lannater*, 3 Neb. 325; *Goodson v. Johnson*, 35 Texas, 622.

<sup>2</sup> 21 Wall. 139.

<sup>3</sup> *Rindskoff v. Barrett*, 11 Iowa, 172; *s. c.* 14 Iowa, 102. But see *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

<sup>4</sup> *Parker, C. J.*, in *Dwight v. Brewster*, 1 Pick. 50; *Lawson on Car.*, § 1.

<sup>5</sup> *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.



## Usage as to Delivery to.

bound in the one case as much as in the other. The usages of the carrier and of the public in this particular are, then, the controlling question, and it being proved that it was his common practice to receive and carry certain property for hire, his calling as a common carrier of such property becomes established and his liability as such attaches. Therefore he may be liable as a common carrier of money, as has been held in a number of cases;<sup>1</sup> and so, where by the usage of trade the carrier of goods is to act as the agent for the sale of them at the port of destination, and to return the net proceeds to the shipper, he is a common carrier of the money on the return trip.<sup>2</sup> The word "goods," when used in defining his business, is interpreted as meaning such things as from usage and custom, his mode of conveyance, his public professions, the character of his particular trade, or the manner of conducting it, he is to be fairly understood as holding himself out to the public as ready to carry for hire.<sup>3</sup> And, therefore, a steamboat may by custom become liable as a common carrier of cash letters.<sup>4</sup> And in an action against a ferryman for injury to a box of jewelry in plaintiff's phaeton, while being landed from the defendant's ferry-boat, the question was whether it was a part of the contract that the defendant should land carriages. It was shown that such was the usage at that ferry, and the plaintiff had a verdict.<sup>5</sup>

§ 79. **Delivery of Goods to Carrier as controlled by Usage.**—The duties and responsibility of a common carrier in respect to the goods of others do not commence until their delivery to him. It is well settled that to make the carrier liable they must be delivered to him, or to some agent of his authorized to receive them on his behalf.<sup>6</sup> When a delivery made to an employee of the carrier who does not possess the necessary authority from his principal is sufficient, has been a subject not free from difficulty, as the adjudicated cases will show.<sup>7</sup> So, the place at which the delivery should be made has given rise to considerable litigation. In both these cases the delivery may be shown to have been made in pursuance of a usage known to the carrier and recognized by him, and will then

<sup>1</sup> *Kemp v. Coughtry*, 11 Johns. 109; *Cincinnati, etc., Mail Co. v. Bond*, 15 Ind. 345; *Sheldon v. Robinson*, 7 N. H. 157; *Emery v. Hersey*, 4 Greenl. 407; *Harrington v. Meschane*, 2 Watts, 443; *Merwin v. Butler*, 17 Conn. 138; *Hosea v. McCrory*, 12 Ala. 349; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133; *Hutch. on Car.*, § 40; *Allen v. Sewall*, 2 Wend. 327; *Sewall v. Allen*, 6 Wend. 335; *Van Santvoord v. St. John*, 6 Hill, 158; *Kirtland v. Montgomery*, 1 Swan, 452.

<sup>2</sup> *Kemp v. Coughtry*, 11 Johns. 107; *Lee v. Salter*, 1 Lalor, 163; *Emery v. Hersey*, 4 Greenl. 407; 16 Am. Dec. 268; *Harrington v. Meschane*, 2 Watts, 443; *Taylor v. Wells*, 3 Watts, 65.

<sup>3</sup> *Hutch. on Car.*, § 77. And see *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 312.

<sup>4</sup> *Hosea v. McCrory*, 12 Ala. 349; *Garey v. Megher*, 33 Ala. 630; *Knox v. Rives*, 14 Ala. 240.

<sup>5</sup> *Walker v. Jackson*, 10 Mee. & W. 161.

<sup>6</sup> *Chitty on Car.* 27; *Brind v. Dale*, 8 Car. & P. 207; *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Camp. 414; *Leigh v. Smith*, 1 Car. & P. 638; *Grosvenor v. Railroad Co.*, 39 N. Y. 34.

<sup>7</sup> *Ibid.*; *Rogers v. Railroad Co.*, 2 Lans. 269; *Quinit v. Henshaw*, 35 Vt. 305; *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54; *Leigh v. Smith*, 1 Car. & P. 638; *Butler v. Basing*, 2 Car. & P. 613; *Allen v. Sewall*, 2 Wend. 327; *Sheldon v. Robinson*, 7 N. H. 157; *Satterlee v. Groat*, 1 Wend. 272; *Dwight v. Brewster*, 1 Pick. 50; *Camden, etc., Transp. Co. v. Belknap*, 2 Wend. 355; *Slim v. Great Northern R. Co.*, 14 C. B. 647; *Taff Vale R. Co. v. Giles*, 2 El. & Bl. 823; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 489; *Gilbart v. Dale*, 5 Ad. & E. 543; *Colepepper v. Good*, 5 Car. & P. 390; *Burrell v. North*, 2 Car. & Kir. 681; *Wilson v. York, etc., R. Co.*, 17 L. J. 223.



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bind him.<sup>1</sup> "It must be admitted," says Mr. HUTCHINSON,<sup>2</sup> "that the doctrine of constructive delivery, without notice to the carrier, is one which should be applied with great caution. It is undoubtedly competent for him to bind himself by such a delivery, either by his express agreement that a deposit of goods at a particular place shall be a valid delivery to him, or by so advertising it to the public, or by a well-known and established custom to receive the goods in that way, which would perhaps be as binding upon him, as to persons who had acted upon the notice or the usage, as an express agreement; and cases may arise in which the usage and course of dealing between the parties should undoubtedly have that effect. But, certainly, to do so they should be shown to have existed, and to have been uniformly acted upon by the parties, by the most satisfactory proof, and for a sufficient length of time to have become an established usage, tantamount to an agreement to that effect, or to a declaration to the public that a delivery in accordance with the usage will be deemed an acceptance by him for the purpose of the transportation; and perhaps it should be shown that a reliance upon the previous course of dealing, or the usage, or the notice, had controlled the action of the shipper in the particular instance. But few cases are to be found in which the rule has been applied, and it is to be presumed that such instances will not be of frequent occurrence." In *Cobban v. Downe*,<sup>3</sup> a delivery to the mate of a ship by a wharfinger was held to be a good delivery, the usage of the wharf being proved to sustain it. Lord ELLENBOROUGH said: "What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained usage of the trade or business in which he is engaged. The defendant has proved that by established usage the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them, from which time it has been considered that their responsibility is then at an end." In *Leigh v. Smith*,<sup>4</sup> which was a similar action against a wharfinger for goods placed in his charge, and which he contended had been delivered by him to the carrier, the evidence simply showed that the goods had been placed on the wharf near the ship. BEST, C. J., on the authority of *Cobban v. Downe*, admitted evidence of the usage, but the witness who was called on behalf of the defendant testified that the custom was to deliver to the mate. The chief justice then said that the usage could not be extended, and directed a verdict for the plaintiff. In an Indiana case it was ruled that while a usage would sustain a delivery to the deck-hands of a steamboat, yet the mere fact that the manner of the reception of the property by the deck-hands was such that the officers whose duty it was to receive goods for transportation must, if they had exercised reasonable diligence, have known that the box was in the boat, and have received it, was not sufficient to charge the carrier, in the absence

<sup>1</sup> Hutch. on Car., §§ 84, 87; *Ford v. Mitchell*, 21 Ind. 54; *Leigh v. Smith*, 1 Car. & P. 638; *Blanchard v. Isaacs*, 3 Barb. 388; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 168; *Green v. Milwaukee, etc., R. Co.*, 38 Iowa, 100; *s. c.*, 40 Iowa, 410; *Wright v. Caldwell*, 3 Mich. 51; *Packard v. Getman*, 6 Cow. 753; *O'Bannon v. Southern Express Co.*, 51 Ala.

481; *Buchanan v. Levi*, 3 Camp. 414; *Illinois Central R. Co. v. Smysers*, 38 Ill. 354; *Burch v. North*, 2 Car. & Kir. 679; *Freeman v. Newton*, 3 E. D. Smith 246; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

<sup>2</sup> Hutch. on Car., § 93.

<sup>3</sup> 5 Esp. 41.

<sup>4</sup> 1 Car. & P. 638.

### Delivery of Baggage.

of a custom authorizing a delivery to the deck-hands.<sup>1</sup> But a delivery to a person who has become accustomed, with the consent of the carrier, to receive, is always sufficient to bind him.<sup>2</sup> Delivery to the driver of a stage-coach, not at the company's office, is not a good delivery, but it may be made so if such was the usage of the company, recognized by it.<sup>3</sup> A delivery on the private wharf of a carrier, although without any notice to him or his servants, will bind him, if such has been his customary mode of receiving goods.<sup>4</sup>

§ 80. **Delivery of Baggage by Passenger.**—The course of business of a carrier may justify a passenger in leaving his baggage at a railroad depot without notice to the company. Thus, in an Iowa case,<sup>5</sup> the plaintiff, desiring to take an early morning train on defendant's road, sent her trunk the evening before by a drayman to the depot. It was left by the drayman in the waiting-room, and as there were no employees of the defendant about the premises, no notice thereof was given to any one. It was shown that the plaintiff had quarterly, for three years, been in the habit of making the journey she was then about to make, and had always sent her trunk the evening before; and also, that other travellers were in the habit of doing the same thing when they went by the morning train. The drayman testified that he had often left baggage at the depot under similar circumstances. The trunk was destroyed by fire the same night. The Supreme Court held that the jury were justified in returning a verdict for the plaintiff. "It is not claimed," said Beck, C. J., "that defendant would be liable without a delivery, either actual or constructive, of the property to its agent or servant. That a delivery may be made at the proper place of receiving such baggage under the express assent or authority of the carrier, without notice to its employees, will not, we presume, be disputed. \* \* \* There was evidence tending to show a course of business on the part of defendant—a custom to receive baggage left at the station-house, as in this case, without notice to defendant's servants. Upon evidence of this character it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced, whether a course of business—a custom—had been established to the effect that a delivery of baggage at the station-house without notice was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."<sup>6</sup>

§ 81. **Usage must be strictly followed.**—The usage must be strictly followed; in other words, the party who sets it up must bring himself within its terms, or it will not protect him. The old case of *Leigh v. Smith*,<sup>6</sup> just cited, is an example of this rule. So, where a trunk was placed on a boat by a person who did not accompany it as a passenger, it was held that the fact that, according

<sup>1</sup> Ford v. Mitchell, 21 Ind. 54.

<sup>2</sup> Burrell v. North, 2 Car. & Kir. 679.

<sup>3</sup> Blanchard v. Isaacs, 3 Barb. 388; Hutch. on Car., § 87.

<sup>4</sup> Merriam v. Hartford, etc., R. Co., 20 Conn. 354; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166. And see Packard

v. Getman, 6 Cow. 757; Buchman v. Levi, 3 Camp. 414; O'Bannon v. Southern Express Co., 51 Ala. 481.

<sup>5</sup> Green v. Milwaukee, etc., R. Co., 38 Iowa, 100; s. c. 41 Iowa, 410.

<sup>6</sup> 1 Car. & P. 638, ante, § 79.

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to the custom of the boat, the delivery of a passenger's baggage by putting it on the boat was sufficient, without further notice, would not avail the plaintiff, he not being a passenger. "It is well settled," said the court, "that if a uniform custom is established and recognized by the carrier, and is known to the public, that property intended for carriage may be deposited in a particular place without express notice to him, that a deposit of property for that purpose, in accordance with the custom, is constructive notice, and would render any other form of delivery unnecessary. The rule is founded in reason, as the usage, if habitual, is a declaration by the carrier to the public that a delivery of property in accordance with the usage will be deemed an acceptance of it by him for the purpose of transportation. To allow a carrier, when property is thus delivered, to set up by way of defence the general rule which requires express notice, would operate as a fraud upon the public and lead to manifest injustice. There was proof in this case from which a jury might infer that it was the usual practice for passengers on the steamboat *Telegraph* to deposit their baggage in a particular place, and that further notice of delivery or acceptance was waived. A careful examination of the record, however, shows that the facts thus proved were inapplicable to the issue made up between the parties. The declaration seeks to charge the defendants for the loss of the trunk and its contents, received by them for the purpose of being transported to St. Clair. There is no averment that the trunk thus delivered contained the ordinary wearing-apparel of a person who had taken passage on the boat, or that it was received as such. The fact that the plaintiff was a passenger and took passage in the boat was essential to a recovery, and on that the proof, with all the evidence received and acted upon, was indirect. There is no pretence that any custom prevailed in respect to the receipt of property as freight. Notice of delivery and acceptance for such purpose is controlled by the general law. The proof is conclusive that the mode of delivery, as sanctioned by the usage, was applicable exclusively to the ordinary baggage of a passenger, and had no application to property received and agreed to be transported as freight. The custom is believed to be universal to allow passengers, in any of the usual modes of conveyance, to carry, free of charge, such wearing-apparel as may be necessary or convenient, and the price paid by the passenger constitutes the consideration for the safe-keeping and transportation of his ordinary baggage. If a trunk, therefore, is deposited with a carrier without being accompanied by a passenger, it is received as freight, and is liable to the payment of ordinary charges; and notice of its delivery to the carrier, and of acceptance, must be given according to the rules of law before any liability can attach in case of loss."<sup>1</sup> So, where the custom makes the placing of goods on the dock near the boat and notice to the carrier a sufficient delivery to him, if more articles are placed on the wharf than the carrier is notified of, he will not be answerable for the excess.<sup>2</sup>

§ 82. Complete Delivery not altered by Usage. — But, though usage may render that an effectual delivery which without it the law would not regard as sufficient, the converse of this rule is not true; for where there has been an actual delivery, a usage on the part of the carrier that he shall not be responsible

<sup>1</sup> *Wright v. Caldwell*, 3 Mich. 51.

<sup>2</sup> *Packard v. Getman*, 6 Cow. 757.

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until something additional has been done, is not effectual to alter his liability. His responsibility becomes fixed by accepting the property to be transported, and the acceptance is complete whenever the property comes into his possession with his assent. A shipper notified a railroad company that he had a quantity of cotton to send by their road, and the company ran a car on a side-track up to his warehouse, which was loaded with the cotton and notice sent to the company's agent; but before anything more was done, the cotton accidentally took fire and was injured. Evidence was offered of a custom of the company, upon receiving such notice, to have the bales counted and give a bill of lading, excepting losses by fire, and then send an engine to remove the cars. But the trial court refused to admit the evidence, which ruling was affirmed on appeal. This decision has been criticised by Judge REDFIELD<sup>2</sup> as not meeting the "highest sense of justice." In this conclusion we cannot concur. The judgment of the court is clearly founded on principles of law and established rules. "The side-track and the cars," said the court, "belong to the company, and are under their exclusive control. And there is no question that the company placed this car at a point opposite the wharf-boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. The company had unquestionably the exclusive use and control of their road, side-tracks, and freight-cars; no use could be made of them without the consent of the company. So long as a car remained on their road or side-track it was under their control, and necessarily in their possession. They had the right to permit their cars to stand at the point at which this one was placed. The company, at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road; but the commission merchant had no such right, even if he had possessed the means. He simply had the right to load the cotton on the car. The wharf-boat, on the contrary, was in the possession of the commission men, and the cotton so continued until it was placed in the car. It then passed into the possession of the company as effectually as if it had been delivered in their warehouse. They substituted their car for their warehouse, no doubt for the mutual convenience of all parties; and this, too, with the assent of the company, to promote their interest in the prosecution of the business for which it was created. If this was a box-car, the company had the right, as soon as the cotton was placed in it, to have it closed and locked; or, if an open car, they had an equal right to have secured the cotton, and any person interfering with it would have been a trespasser, and the company could have recovered damages for any injury thus perpetrated. No difference is perceived in receiving freight on the platform of their depot and with their cars at any place on their road or side-track, or whether it is placed there by their own employees or by other persons, so it is done with the assent of the company. It is not the mere signing a bill of lading which transfers the possession of freight to the company, but it is the evidence that they have received possession. Their possession may be shown by any other legitimate evidence. The liability of the common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his cart, boat, or car without his knowledge or acceptance, he is not liable. If the owner or person having the custody of the

<sup>1</sup> Illinois, etc., R. Co. v. Smyser, 33 Ill. 354.<sup>2</sup> Redf. on Car., § 101.

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goods to be shipped never parts with their possession, or does not place them under the control of the carrier, there is no bailment, and consequently no liability incurred. But in this case the company, by their acts, accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of the plaintiff's agent placed the cotton on the platform of the depot, with the assent of the company, to be transported, no one would doubt their liability; and yet in principle no difference is perceived. According to the current of modern decisions, it is competent for a common carrier by rail to limit his common-law liability by express contract. It was held in the case of *Illinois Central Railroad Company v. Morrison*,<sup>1</sup> after a careful review of the adjudged cases, that railroad companies could restrict their liability by express agreement, they still being held responsible for gross negligence or wilful misfeasance. But in that case the rule was restricted to a special contract; nor are we aware that any well-considered case has carried it farther, and we have no disposition to do so unless compelled by authority. But this rule of law can have no application to this case, because there is no pretence that there was any special agreement restricting the liability of this company. Their liability cannot be limited by showing that it was the usage of the road to embrace in all bills of lading for the shipment of cotton that the company should not be liable for losses by fire. There was an offer to prove that such had been the usage of the company, and that it was known to shippers. If this had appeared it would not have availed, as nothing but a special agreement could have that effect." A Connecticut case somewhat resembles the foregoing. There the plaintiff, who intended to leave upon an afternoon train, took his trunk to the depot in the morning, but was told by the agent of the company that they did not check baggage until fifteen minutes before the train left. He thereupon placed the trunk with the agent, and at the time indicated called for and obtained a check, but on his arrival at his destination it was found that some money and clothing had been abstracted from it. In a suit for its value, the defendants claimed that the company were only liable from the time when, according to their custom, they received the trunk for transportation, — viz., the time when it was checked, — and that if the articles were stolen after it was left at the depot and before it was checked, there could be no recovery. But the court refused to accede to this view. "The custom of checking," they said, "can have no effect upon the character of the delivery. That custom did not necessarily qualify the delivery and acceptance. The check is in the nature of a receipt, and may be given and received at any time when the convenience and custom of the company dictate. It is not the contract, but evidence of the ownership, delivery, and identity of the baggage. It is the delivery and acceptance, the abandonment of all care of the baggage by the passenger and the assumption of it by the agents of the carriers, expressly or impliedly, for the purpose of transportation, which fix the liability of the latter as such, and that liability begins when the baggage is delivered to the agent of the company for carriage."<sup>2</sup>

<sup>1</sup> 19 Ill. 136.<sup>2</sup> *Hickox v. Naugatuck R. Co.*, 31 Conn. 231; *Freeman v. Newton*, 3 E. D. Smith, 246;*Camden, etc., Transp. Co. v. Belknap*, 21 Wend. 334.

## Usage as to Stowage.

§ 83. **Liability for Property while in Transit.**—Although, when the property is delivered into the carrier's possession, the owner and his servants may accompany it and keep an eye on it,<sup>1</sup> yet the carrier must be given the full control of the property; and if it appears that there is no intention to trust him with its carriage, he will not be held liable.<sup>2</sup> A custom that the shipper shall have full control of the goods would, therefore, excuse the carrier for their loss in every instance in which it was followed. The defendant was a lighterman on the Thames, and was sued on his undertaking to carry for hire. The evidence showed that it was "the usage of the company, on the unshipping of the goods, to clap an officer—who is called a guardian—in the lighter, who, as soon as the lading is taken in, puts the company's locks on the hatches, and goes with the goods to see them safe delivered at the warehouse. It appeared to be done in this case, and part of the goods were lost." RAYMOND, C. J., was of opinion that "this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself," and nonsuited the plaintiff.<sup>3</sup> But in *Schieffelin v. Harvey*,<sup>4</sup> decided in New York, testimony was offered to show that as soon as a custom-house officer was put on board a vessel the goods were at the risk of the shipper, according to the general understanding of merchants. But THOMPSON, J., said: "The testimony is inadmissible. The established principles of law cannot be controlled by custom."

§ 84. **Stowage of Goods as affected by Custom.**—In the carriage of goods by water, where there is no bill of lading, or where the bill of lading is silent upon the subject of storage, it is the duty of the carrier to stow them under deck.<sup>5</sup> But usage has changed this, not only in the carriage of dangerous oils and liquids,<sup>6</sup> and in the transportation of animals,<sup>7</sup>—because the former, if carried on deck, in case of accident may be more easily cast overboard, and the latter are more healthy, and can be cared for better than if in the hold,—but in other cases.<sup>8</sup> In *Gould v. Oliver*,<sup>9</sup> a usage to load timber on the decks of sailing-

<sup>1</sup> *Evans v. Fitchburg, etc., R. Co.*, 111 Mass. 192; *Sneesby v. Lancashire, etc., R. Co.*, L. R. 9 Q. B. 263; *Robinson v. Dunmore*, 2 Bos. & Pul. 416; *Cole v. Goodwin*, 19 Wend. 251; *Le Conteur v. London, etc., R. Co.*, L. R. 1 Q. B. 51.

<sup>2</sup> *Hatch, on Car.*, § 85; *Ang. on Car.*, § 140; *Tower v. Utica, etc., R. Co.*, 7 Hill, 47; *Cohen v. Frost*, 2 Duer, 335; *Hollister v. Nowlen*, 19 Wend. 234; *Willoughby v. Horridge*, 74 Eng. Com. Law, 742; *Brind v. Dale*, 8 Car. & P. 207; *White v. Winnismet Co.*, 7 Cush. 155; *Miles v. Cattle*, 6 Bing. 743; *Orange County Bank v. Brown*, 9 Wend. 85.

<sup>3</sup> *East India Co. v. Pullen*, 2 Stra. 690.

<sup>4</sup> *Anth.* 76.

<sup>5</sup> *Dodge v. Bartol*, 5 Greenl. 286; *Wolcott v. Insurance Co.*, 4 Pick. 429; *Taunton Cop-*

*per Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Sproat v. Donnell*, 26 Me. 185; *Lamb v. Parkman*, 1 Sprague, 343. This rule, it seems from recent decisions, does not apply to steamboats on lakes and rivers. *Harris v. Moody*, 30 N. Y. 266; *Gillett v. Ellis*, 11 Ill. 579.

<sup>6</sup> *Da Costa v. Edmunds*, 4 Camp. 141.

<sup>7</sup> *Brown v. Cornwell*, 1 Root, 69; *Milward v. Hibbert*, 3 Ad. & E. (N. S.) 120.

<sup>8</sup> *Merchants', etc., Ins. Co. v. Shillito*, 15 Ohio St. 559; *Gould v. Oliver*, 4 Bing. N. C. 134; *Chubb v. Renaud*, 16 L. R. (N. S.) 492; *The Star of Hope*, 17 Wall, 651; *The Paragon, Ware*, 322; *Harris v. Moody*, 30 N. Y. 266; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Paterson v. Black*, 5 Upper Canada Q. B. 481.

<sup>9</sup> 4 Bing. N. C. 134.



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vessels was recognized, and in *Harris v. Moody*,<sup>1</sup> part of the cargo of a steamboat. From two recent cases it appears that when custom requires the carrying of certain goods on deck or in the cabin, to carry them in the hold will render the carrier liable in the event of their being damaged.<sup>2</sup>

A carrier by water is also liable for damage done to the goods of a shipper, stowed in the hold of his vessel, through contact with other goods.<sup>3</sup> But this rule, also, usage may alter;<sup>4</sup> as by showing that, according to the usage of the trade, salt in sacks was stored with other goods,<sup>5</sup> flour upon hogsheds of sugar,<sup>6</sup> gunny-cloth, and bags, close up to the upper deck,<sup>7</sup> the carrier will be discharged from liability for a loss which but for the usage he must have assumed. In the last of these cases the court, in deciding the question, said: "Now, it having been shown that this cargo was stowed in accordance with an established usage, why is not that decisive in favor of the libellants? It has been earnestly and ably contended that it is not, but that this usage is of such a character that it is to be rejected and disregarded. What is its character? It is a usage as to the mode of stowing a cargo of merchandise for a sea-voyage — a usage of trade as to the details in the mode of carrying it on. It violates no rule of law or principle of public policy, but is a matter of business between private individuals, to be regulated by them. There is no controversy that the parties may make a contract for any mode of storage which they may see fit. What contract have they made in this respect? In the absence of expressed stipulations, the usage of the trade answers this question; to that usage the contract tacitly refers, not to contradict or vary its terms, but for expounding its meaning and supplying details in the mode of its execution. Let us look into this charter-party. It contemplates the conveyance by sea of a full cargo of great value by a long voyage, and yet not a word is said as to the manner in which that cargo shall be protected at the bottom, at the sides, or on the top. Not one word is said as to the navigation of the ship, by how many or what kind of officers and seamen, or sails or rigging, or other essential requisites for the voyage. The contract being silent in this respect, how are the rights and duties of the parties to be ascertained? The answer is, by the usage of the trade."

§ 85. **Delivery by Carrier as controlled by Custom.** — MR. HUTCHINSON SAYS: "The delivery required of the common carrier has, by usage and legal construction, come to have very different significations, according to the particular kind of business which he undertakes and the various modes of conveyance which he employs in its transaction; and that which constitutes a delivery in one case, or as to one kind of carrier, will not be considered as sufficient for the purpose when performed by another, the particular nature of whose employment as carrier or whose mode of carriage may be different. *In this regard the usages of the various kinds of carriers have conformed to the necessities of commerce, and the law,*

<sup>1</sup> 30 N. Y. 267. And see *Barber v. Brace*, 3 Conn. 9.

<sup>2</sup> *Blakie v. Steinbridge*, 5 Jur. (N. S.) 1128; *The Star of Hope*, 17 Wall. 651.

<sup>3</sup> *Gillespie v. Thompson*, 6 Bl. & Bl. 477; *Brousseau v. The Hudson*, 11 La. An. 427; *Cranwell v. The Fanny Fosdick*, 15 La. An. 436; *The Colonel Ledyard*, 1 Sprague, 530;

*Bearse v. Ropes*, 1 Sprague, 331; *The Chesire*, 2 Sprague, 28.

<sup>4</sup> *Clark v. Barnwell*, 12 How. 273; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Sprague, 343.

<sup>5</sup> *Clark v. Barnwell*, 12 How. 273.

<sup>6</sup> *Baxter v. Leland*, 1 Blatchf. 526.

<sup>7</sup> *Lamb v. Parkman*, 1 Sprague, 343.



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in its turn, seems to have been made to conform to such usages."<sup>1</sup> And again:<sup>2</sup> "The manner in which the various classes of common carriers are required to make delivery has now become so well settled that a case could but seldom occur in which it could not be at once determined without a resort to the proof of usage or custom. Not only have the usages of those who ply the business of carrying goods for hire for the public, in the various modes and according to their various professions, become universally understood, but as to those into whose hands the great bulk of the carrying business of the country has fallen, most of the questions of doubt as to the manner in which they are required to make the delivery of the goods to the consignee, or party entitled to them, have been settled by judicial decision: and whenever such questions now arise, judicial notice will generally be taken of their several modes of delivery, as matters of law rather than of fact as to usage. It is still, however, the duty of most of those who are classed as common carriers to make personal delivery to those for whom the article carried is intended; and whenever the carrier engaged in a particular mode of carrying, as to which the kind and manner of delivery required have not been so established, claims that he is exonerated by the long-existing and uniform course of his business from making a personal delivery, the presumption of law will be against his claim, and he must overcome it by proof. Delivery to the person for whom the goods are intended, or to whom they are consigned, being the rule, he must bring himself within the exception by showing a long-continued and well-understood usage." And in an Illinois case, *CATON, J.*, says: "While the convenience of commerce may require different rules for the delivery of goods when transported by sail or steam vessels on the great lakes, on the rivers, on the canal, or by railroad, by plank or the common roads, it would be very inconvenient for each commercial point on these thoroughfares to establish an independent usage by which the same contract would receive different constructions, depending upon the place at which it was to be performed. Where the necessities of any particular line of commerce may render a particular usage so indispensably necessary as to commend itself to, and force itself upon all those engaged in that line of commerce, there may be great propriety in allowing such usage, when it has become universal and well understood, and acquiesced in by all, to be proved in order to explain the intention of parties upon points as to which the contract itself is not explicit, although without such usage the law might give it a different construction. This is allowed upon the same principle which allows other extraneous facts to be proved, in view of which parties have entered into engagements, and by the aid of which their intentions are ascertained where otherwise they might be doubtful. Hence, in construing a bill of lading or other contract for transporting freight, we must look to the mode of transportation by means of which the contract is to be performed — as, if by water-craft, navigating either the lakes, rivers, or canals, it is not to be presumed that the delivery is to be made away from the watercourse; or, if by railroad, away from the track or depot of the road, unless it is otherwise expressly stipulated in the contract. If, however, this is expressly stipulated, that would show an intention that the carrier should use other means of transportation than those usually employed in the course of such trade. Such expressed intention would destroy the presumption that the con-

<sup>1</sup> *Hutch. on Car.*, § 338.<sup>2</sup> *Id.*, § 342.

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tract was to be performed by the means of transportation in ordinary use by the party undertaking to perform it. In construing contracts of affreightment, the courts themselves take notice of the course of trade, and the means of transportation in use in carrying on that commerce; and, in aid of the means of information which the courts are supposed to possess in reference to commercial transactions, usages which the necessities of a particular trade have established have been allowed to be proved to the courts, to aid them in giving a construction to contracts made in reference to such trade."<sup>1</sup>

§ 86. **Delivery by Carrier — Continued.** — As with the delivery to the carrier the liability of the carrier commences, so with the delivery to the consignee the liability of the carrier ends. At first it was looked upon as the duty of common carriers to deliver the goods to the consignee personally. "A contrary decision," said ASHHURST, J., in an old case,<sup>2</sup> "would be highly inconvenient, and would open the door to fraud; for if the liability of the carrier were to cease when he brought the goods to any inn where he might choose to put his coach, and a parcel containing plate or jewels brought by him were lost by him before it was delivered to the owner, the latter would only have a remedy against a common porter." But when this rule was established, the carriage of goods was done throughout England by coach-owners and wagoners, who were able to go about from house to house, if necessary, to make delivery of the property intrusted to their care. It was, therefore, early relaxed in the case of foreign ships, whose undertaking, by custom, was merely to carry from port to port. And for the same reason, and on grounds of convenience, the strict rule as to personal delivery is not applied to either domestic carriers by water or carriers by railroad. The former "are confined to the limits and courses of the waters upon which they navigate their vessels, and cannot leave them with their vehicles of transportation to seek the consignee or other person entitled to the goods upon the land." The latter, like carriers by water, "cannot deliver at the warehouse or other place of business of the consignee without the employment of other means of transportation than such as they employ upon their tracks." But express companies are within the old rule.<sup>3</sup>

<sup>1</sup> Caton, J., in *Dixon v. Dunham*, 14 Ill. 324.

<sup>2</sup> *Hyde v. Trent Nav. Co.*, 5 Term Rep. 389.

<sup>3</sup> *Hutch. on Car.*, §§ 341-370; *Redf. on Rys.*, § 157; *Cope v. Cordova*, 1 Rawle, 203, *post*, § 94. Concerning delivery at elevators, as is the rule as to an important part of the inland commerce of this country, we find the following note of a decision of interest in the *New York Daily Register* for August, 1880: "Among the new methods which give rise to new questions of law is that of the use of elevators in the grain trade. A recent decision of the Buffalo Superior Court, of general importance, holds that a consignee of even a part of a cargo of grain arriving has a right to select the elevator into which his part shall be discharged; and that a discharge by the carrier to another, contrary

to the consignee's request, is not a good delivery. It was claimed by the carrier that, by custom, if a cargo of grain carried by a vessel from a port in another State to the port of Buffalo consists of two or more parcels consigned to different persons, under bills of lading containing no other provisions as to delivery than that the grain shall be delivered to the consignee or his assigns, the person who is the consignee of the major part of the cargo may appoint and direct at what elevator his part shall be delivered, and that the discharge of the whole cargo into the elevator so designated is a good delivery as to each of the several parcels, though the consignee of the minor parcel may have given express and timely directions that his parcel be delivered at another

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But even carriers by land who were able, and upon whom devolved the duty of making a personal delivery, — such as coach-owners and cartmen,<sup>1</sup> — might show that the common and well-known usage of their business did not require it, and in such cases a personal delivery would not be necessary. In *Garside v. Trent Navigation Company*,<sup>2</sup> decided in 1793, evidence of usage was received to determine whether the defendants, at the time the goods were burned, held them as common carriers or warehousemen. In *Hyde v. Trent Navigation Company*,<sup>3</sup> decided about the same time, the judges agreed that while carriers by a canal were bound to make a personal delivery to the consignee, their obligation might be changed by the custom of trade; and the same principle has been frequently recognized in the American decisions.<sup>4</sup>

§ 87. Notice required by Law, but waived by Usage. — The established rules of law, however, require of the carrier that he shall give notice of the arrival of the goods to the proper person, in order that he may have an opportunity of removing them at the earliest moment.<sup>5</sup> The course of business between the carrier and his customers may entirely do away with this necessity. "The effect of usage in doing away with the requirement of notice in cases of carriers by water," says a writer from whom we have already quoted at some length,<sup>6</sup> "is one of importance, especially in river navigation. Such carriers, especially upon our Western rivers, rarely, if ever, give notice to the consignees of freight which is put off for them at the numerous places of landing upon these streams, unless the delivery be at some port. It seems to have grown into a universal understanding in such cases that the mere deposit of freight

elevator. The court held that the carrier failed to establish the existence of the alleged custom, and that in the absence of such a proven usage the rule of the common law — that the carrier shall deliver the goods to the assignee at his place of business — prevails in respect to grain and other cargoes carried in bulk by vessels engaged in this inland trade; and that a different rule, which had its origin in the usages of the ocean trade, and is applicable to general ships engaged in that traffic, has no force or application in respect to that class of our inland commerce to which the question in this case relates." The case referred to does not, as yet, appear to have been officially reported.

<sup>1</sup> Ang. on Car., § 295; Add. on Con. 810; 2 Kent's Comm. 604; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 389; *Golden v. Manning*, 3 Wils. 429; *Smith v. Nashua, etc.*, R. Co., 27 N. H. 86; *Storr v. Crowley*, 1 McCl. & Y. 136; *Stephenson v. Hart*, 4 Bing. 476; *Garnett v. Willan*, 5 Barn. & Ald. 53; *Bodenham v. Bennett*, 4 Price, 34; *Duff v. Budd*, 3 Brod. & B. 177; *Birkett v. Willan*, 4 Barn. & Ald. 356; *Gibson v. Culver*, 17 Wend. 305.

<sup>2</sup> 4 Term Rep. 581.

<sup>3</sup> 5 Term Rep. 339.

<sup>4</sup> *Gibson v. Culver*, 17 Wend. 305; *Eagle v. White*, 6 Whart. 505; *Chickering v. Fowler*, 4 Pick. 371; *McCarty v. New York, etc.*, R. Co., 30 Pa. St. 247; *Witzler v. Collins*, 70 Me. 290; *The Felix*, 2 Ad. & E. 273; *Petrochino v. Bott*, L. R. 9 C. P. 355.

<sup>5</sup> *Wardell v. Mourillyan*, 2 Esp. 693; *Quiggin v. Duff*, 1 Mee. & W. 174; *Packard v. Getman*, 6 Cow. 757; *Scholes v. Ackersland*, 15 Ill. 474; *Crawford v. Clark*, 15 Ill. 561; *Fiske v. Newton*, 1 Denio, 45; *Price v. Powell*, 3 N. Y. 322; *Pickett v. Downer*, 4 Vt. 21. See, as to railroads, *Moses v. Boston, etc.*, R. Co., 32 N. H. 523; *Thomas v. Boston, etc.*, R. Co., 10 Mete. 472; *Norway Plains Co. v. Boston, etc.*, R. Co., 1 Gray, 263; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; *Porter v. Chicago, etc.*, R. Co., 20 Ill. 407; *Rickard v. Michigan, etc.*, R. Co., 20 Ill. 404; *Chicago, etc.*, R. Co. v. *Scott*, 42 Ill. 132; *Merchants' Despatch Co. v. Hallock*, 64 Ill. 234; *McCarty v. New York, etc.*, R. Co., 30 Pa. St. 247; *Shenk v. Propellor Co.*, 60 Pa. St. 109; *Leavenworth, etc.*, R. Co. v. *Maris*, 16 Kan. 333; *Alabama, etc.*, R. Co. v. *Kidd*, 35 Ala. 209.

<sup>6</sup> *Hutch. on Car.*, § 366, note.

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upon the bank of the river at the usual place of landing is all that the carrier is expected to do. Having grown into a universal custom, and being so understood between the parties, there can be no doubt but that the carrier, in so depositing ordinary freight, has done his duty, without giving notice to the consignee." The effect of such a usage is learnedly discussed in the opinion of the Supreme Court of Vermont in the leading case of *Farmers and Mechanics' Bank v. Champlain Transportation Company*,<sup>1</sup> given in full at the commencement of this chapter. In many other cases, evidence of a similar character has been held to be admissible, viz.: that it was customary with the merchants of B. to receive their goods on the wharf, and not have them put into the storehouse; that they took charge of them themselves immediately upon their being landed, and usually took them away the same day; but if there was a probability of their being damaged by remaining exposed to the weather, or if they were considered unsafe on the wharf, it was customary, if the owner did not come and take charge of them, to put them into the storehouse;<sup>2</sup> that it was the uniform course of business of the defendant line of stages to leave goods or freight transported by it, directed to T., at the stage-house there, and not to deliver the same at the residence or place of business of the consignee; that the usage prevailed on the whole course of the line to leave goods or freight at the usual stopping-places of the stage in the towns to which the goods were directed, to be delivered to the consignees when called for;<sup>3</sup> that by the custom at N., steamboats deliver freight by putting it on the wharf and exhibiting in some public place a manifest of the cargo; that freight thus placed upon the wharf is hauled away by the consignees or boss-draymen without any special notice, the consignees and the draymen themselves taking notice of the arrival of boats and of freight for them, if any;<sup>4</sup> that at a way-station where the business of a railroad was not of sufficient importance to warrant the erection of warehouses or to have freight-agents, there was a notorious custom, acquiesced in by all persons in the neighborhood receiving freight, to deliver goods at the station without storing them, and without notice.<sup>5</sup> In a New York case, where it appeared to have been the custom of the plaintiff's agent to receive from the defendant's wharf the daily shipment of goods from his factory, his carman going daily to the wharf and conveying the goods to the store of the consignee, the court held that from the long-continued practice the consignee must have known that, in the ordinary course of business, goods arriving from the factory by defendant's line would be awaiting him each day at the wharf; saying that where a regular business is thus carried on, a specific notice from the carrier of the arrival of each parcel is not necessary, and that his duty is performed when he has landed the goods at the accustomed place and the consignee has had a reasonable time to remove them.<sup>6</sup> In *Dixon v. Dunham*,<sup>7</sup> by the terms of a bill of lading of a vessel, the defendant agreed to transport from Buffalo to Chicago certain goods and deliver them to the plaintiff, who was the

<sup>1</sup> 16 Vt. 52; 18 Vt. 131; 23 Vt. 186; *ante*, p. 133.

<sup>2</sup> *Blin v. Mayo*, 10 Vt. 56.

<sup>3</sup> *Gibson v. Culver*, 17 Wend. 305.

<sup>4</sup> *Huston v. Peters*, 1 Mete. (Ky.) 558.

<sup>5</sup> *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

<sup>6</sup> *Russell Man. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Ely v. New Haven Steamboat Co.*, 53 Barb. 207. And see *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541.

<sup>7</sup> 14 Ill. 324.

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consignee at Chicago. Both the plaintiff and defendant owned wharves at Chicago. The goods being brought to the defendant's wharf, he notified the plaintiff that they were there, but the latter refused to receive them unless delivered to him at his own wharf. The Supreme Court of Illinois ruled that under the terms of the contract the captain of the vessel was bound to deliver the goods to the plaintiff at the place of business of the latter, if he had one convenient, in the port of Chicago; but that it was competent for the defendant to set up a usage in the port of Chicago that goods should be delivered at the wharf selected by the master of the vessel, and that consignees should receive them there; and a custom in Chicago that a consignee of a vessel is allowed one day after notice of her arrival in which to provide a dock or place for unloading her, has been recognized.<sup>1</sup>

Where it is the custom at lake ports for grain-bearing vessels to unload in the order of their arrival, the ship-owner must await his turn for a reasonable time, to be measured by the ordinary volume and the exigencies of trade at that place; and it has been held that, such a custom being reasonable, it is not within the power of a ship-owner, by notice to a consignee, to define an arbitrary period within which his cargo must be discharged.<sup>2</sup> And a custom at the port of Baltimore to stop discharging cargoes of brimstone when there is a high wind, because brimstone is a substance liable to be blown away in the handling necessary to unload it from the ship, has been held a sufficient justification on the part of a consignee of a load of brimstone in refusing to receive it on a windy day.<sup>3</sup> A usage at New York to receive shipments during the quarantine season at the quarantine grounds would excuse a delivery there where the bill of lading expressed the delivery to be made at the "port of New York."<sup>4</sup>

§ 88. Cases where an alleged Custom as to Delivery did not prevail. — In *Galloway v. Hughes*,<sup>5</sup> the court, after hearing the witnesses to the alleged custom, ruled that, according to the usage at Charleston, landing cotton on the wharf was not a fulfillment of the carrier's contract to deliver, but that it should have been deposited in the public stores in the consignee's name. In *The Sultana v. Chapman*,<sup>6</sup> the jury found that a usage set up by the defendants to deliver goods at a pier extending into Lake Michigan, instead of at the warehouse or place of business of the consignees, was not established, and the court refused to disturb the verdict. In *The Mary Washington v. Ayres*, decided in the United States Circuit Court for the District of Maryland by Chief Justice CHASE,<sup>7</sup> merchandise transported by water was landed at the carrier's wharf, and no one being there to receive it, was placed in their warehouse on the wharf, where, before it was removed by the consignees, it was damaged. No notice had been given of its arrival. It was held that the carrier was liable. "The duty of a carrier by water," said the chief justice, "is not fulfilled by

<sup>1</sup> *Fulton v. Blake* (U. S. Dist. Ct. North. Dist. Ill.), 12 Am. L. Reg. (N. S.) 779.

<sup>2</sup> *The M. S. Bacon v. Erie, etc., Transp. Co.* (U. S. Cir. Ct. West. Dist. Pa.), 11 Pittsb. L. J. 35. And see *Cross v. Beard*, 26 N. Y. 85; *Rogers v. Forrester*, 3 Camp. 485; *Banister v. Hodgson*, 2 Camp. 483; *Croucher v. W.*

*der*, 98 Mass. 322; *Consolidation Coal Co. v. Shannon*, 34 Md. 144.

<sup>3</sup> *Bertollati v. A Cargo of Brimstone* (U. S. Dist. Ct. Dist. Md.), 11 Cent. L. J. 354.

<sup>4</sup> *Bradstreet v. Heron*, Abb. Adm. 209.

<sup>5</sup> 1 Bailey, 553.

<sup>6</sup> 5 Wis. 454.

<sup>7</sup> 5 Am. L. Reg. (N. S.) 692.

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simple transportation from port to port. The goods must be delivered, or at least landed, and a reasonable opportunity given to the consignee of ascertaining their condition. In order that opportunity for inspection and for the removal of the goods may be given, the consignee must be notified of the arrival of the goods. This is the general rule. If exceptions are made by usage, circumstances, or special arrangements, they must be shown by proof. In the present case, the respondents allege that it was not their practice to give notice to consignees; but, instead of giving such notice, to deposit goods in their warehouse, where the consignees were expected to call for them on learning from their correspondents, or otherwise, of their arrival. They insist that this arrangement was for the benefit of the owners of the goods, and was understood and agreed to by them. The evidence does not sustain this claim. It shows clearly enough the practice of the respondents, but it does not show any understanding on the part of the owners of the goods that the respondents were to be relieved from their responsibility as carriers until its actual delivery, or its equivalent deposit in their warehouse, with information conveyed to the owners in some way that their goods had arrived. The warehouse arrangement was rather for the convenience of the carriers than of freighters or consignees. The storage, with information of arrival, however obtained, may be regarded properly enough as a substitute for actual and direct notice; and it may be admitted that opportunity for removal, after such information, would discharge the carriers from responsibility as such, in the same manner as actual notice and like opportunity. But to hold that mere deposit in their own warehouse, under the circumstances of this case, terminated their special responsibility, would be a dangerous relaxation of the salutary rule on which the security of commerce so largely depends." The custom of lake ports, that on the failure of consignees to provide for the delivery of the property consigned to them, for twenty-four hours after the report of its arrival, the master of the vessel is entitled to store the freight, subject to charges, at the nearest port, is not a reasonable one at Port Colborne, on Lake Erie, where there is no facility for the discharge of the cargo except at one place, and where it is the custom of the port for vessels to wait their turn at that place.<sup>1</sup>

§ 89. **Cannot prevail against Express Directions.**— Usage, however, cannot be set up as against the express directions of the shipper, or an express contract between the parties, and such directions the carrier will disobey at his peril.<sup>2</sup> A few examples of this rule will suffice: *M.*, a common carrier, received from *W.* an anchor, with directions to deliver it to "Messrs. Bell, Anchram & Buxton, Rotherhithe." *M.* delivered it at Rotherhithe, instead of to the persons specified. A custom on the part of carriers not to concern themselves about goods after they had been delivered at the wharf did not protect *M.*<sup>3</sup> *S.* delivered a horse to a railroad company to be transported from Boston to Portland, with orders to have it placed in a close car. The horse was carried in an open car, and sustained damage. The railroad was held liable for the damage, although it was its custom to carry horses in either kind of a car indiscrimi-

<sup>1</sup> *Strong v. Carrington* (U. S. Dist. Ct. North. Dist. N. Y.), 2 Am. L. Reg. (N. S.) 287.

<sup>2</sup> *Hutch. on Car.*, § 310.

<sup>3</sup> *Wardell v. Mourillyan*, 2 Esp. 693. And see *Streeter v. Horlock*, 1 Bing. 34.

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## Express Directions Govern.

nately.<sup>1</sup> The agent of a steamship company at Havre gave B. a bill of lading of certain goods, which the company undertook to carry to Liverpool on its steamship and there transship them on board the City of Manchester, which was appointed to sail on September 6th, and failing shipment by her, then by the first steamship sailing after that date. The goods, however, arrived at Liverpool earlier than was expected, and in time for the City of Philadelphia, one of the company's steamships, which sailed on the 30th of August. The defendant company therefore placed a portion of them on the City of Philadelphia, and that vessel being lost on the voyage, it was held that they were liable for the deviation, notwithstanding a custom among shippers that goods should be shipped to their destination with all possible dispatch, and by the first vessel sailing after their arrival at Liverpool.<sup>2</sup> So, in a late English case the defendant chartered a vessel from the plaintiff for a particular voyage. In the charter-party it was agreed that, after loading, the vessel should proceed to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, both ports included, as ordered, or "so near thereto as she could safely get," and deliver the cargo on being paid freight. The vessel, on being ordered for Hamburg, sailed for that port; but on account of her draught of water she could not get nearer to Hamburg than Stade, at which place the plaintiff offered to deliver the cargo, or so much of it as would lighten the ship and enable her to proceed. The defendant refused to accept any of the cargo at Stade; and in order to earn the freight, the plaintiff discharged part of the cargo into lighters, in which it was conveyed to Hamburg, and there delivered to the defendant's agent. The vessel, being thus lightened, arrived at Hamburg and delivered the remainder of the cargo. The action was for breach of the charter-party in refusing to accept any of the cargo at Stade, and the plaintiff claimed as damages the expense incurred by him for lighterage from Stade to Hamburg. The defendant pleaded a custom of the port of Hamburg, by which he was not bound to accept at any place but Hamburg. But the Court of Appeal held that the custom of Hamburg could not override the express agreement in the charter-party, and that the plaintiff was entitled to the lighterage expenses.<sup>3</sup> And where wheat was to be transported by the carrier to New York on account and order of one Bissell, and the bill of lading contained the memorandum, "Notify E. S. Brown, N. Y.," and the carrier delivered the wheat to Brown instead of Bissell, it was held not admissible to show that by the custom at New York, under such bills of lading, property was rightly delivered to the person to be notified.<sup>4</sup> But a custom that bills of lading for merchandise shipped are delivered only to the party holding the receipt of the master or agent of the vessel, and upon its surrender, has been recognized in New York.<sup>5</sup>

§ 90. **Delivery on prohibited Days.** — The carrier must not land the goods, nor can he require the consignee to accept them or take them away on the Sab-

<sup>1</sup> *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228.

<sup>2</sup> *Bazin v. Steamship Co.*, 3 Wall. jr. 229. And see *Express Co. v. Kountze*, 8 Wall. 342; *Duneth v. Wade*, 3 Ill. 285; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; *Hast-*

*ings v. Pepper*, 11 Pick. 41; *The Star of Hope*, 17 Wall. 651.

<sup>3</sup> *Hayton v. Irwin*, 28 Week. Rep. 138.

<sup>4</sup> *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Farmers', etc., Bank v. Erie R. Co.*, 72 N. Y. 188.

<sup>5</sup> *Blossom v. Champion*, 37 Barb. 554.



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bath, or upon any day on which labor is forbidden. But that a certain day is a holiday by proclamation or statute will not, unless labor be also interdicted, afford any excuse to the consignee for not receiving and removing the goods; and if he fail to do so, and they are lost during the delay, he, and not the carrier, must bear the loss. Therefore, in *Richardson v. Goddard*,<sup>1</sup> a day appointed by the governor of Massachusetts as a general fast-day, and in *Russell Manufacturing Company v. New Haven Steamboat Company*,<sup>2</sup> the 4th of July, were held to be proper days on which to tender and receive the goods. But in the first case the court, after resolving that there was no law in the State of Massachusetts prohibiting the transaction of business on the day in question, inquired, first, whether there was any general custom or usage engrafted into the commercial or maritime law prohibiting the unloading of vessels and a tender of freight to the consignee on a day set apart for a church festival or fast; and, secondly, whether there was any special custom in the port of Boston, where the goods were brought, forbidding a carrier to unload a vessel on such a day, and compelling him to observe it as a holiday. Answering the first question in the negative, the court (GRIER, J., delivering the opinion) say: "After a careful examination of the testimony, we are compelled to say that we find no sufficient evidence of such a peculiar custom in Boston, differing from that of all other commercial cities in the world. The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work, or do it privately; some work half the day, and some not at all. Public officers, school-boys, apprentices, clerks, and others who live on salaries or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libellants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear that, however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that, like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston, if it amount to anything more than that every man might do as he pleased on that day, did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day." And in the New York case<sup>3</sup> the court said: "The 4th of July is not a legal holiday, except for certain specified purposes not affecting this case. It presented no legal obstacle to the removal of the goods. But we think that the evidence as to the usage claimed by the plaintiff to exist in respect to receiving goods on that day should have been submitted to the jury, and that they should have been charged, as requested, that in case there was such a usage or established course of dealing in that respect as was claimed by the plaintiff, the consignee was entitled to a reasonable time after that day to remove the goods."

<sup>1</sup> 23 How. 23.<sup>2</sup> 50 N. Y. 121. And see *Ely v. Manhattan Steamboat Co.*, 53 Barb. 207.<sup>3</sup> *Russell Man. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121.

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§ 91. **Means for Delivery.** — If, by the usage of the place and trade, the appliances for the delivery of heavy articles are furnished by the consignees, the carrier will not be liable for injuries to the goods caused by defects in such appliances.<sup>1</sup>

§ 92. **Usage may enlarge the Carrier's Duty.** — Usage, however, may enlarge the duty of a railroad company, and make it necessary, in order to discharge its obligation, that there should be something approaching to a personal delivery — as, where it has been the custom of a railroad to deliver cars loaded with lumber for the plaintiff at or near the plaintiff's place of business, it will not be excused in a later case by delivering the lumber at its depot.<sup>2</sup> And, therefore, where it appeared that according to the custom of a steamboat its hands were, on arrival at New Orleans, in the habit of taking the passengers' trunks from the boat to a railroad station and getting them checked, it was held that the owners of the boat were liable for a non-delivery at the railroad.<sup>3</sup>

§ 93. **Complete Delivery not affected by Usage.** — We have seen, in a former section,<sup>4</sup> that, the delivery to a carrier being complete, a usage on his part that the delivery is not considered complete will not affect the case. A similar rule prevails as to delivery by a carrier. In *Reed v. Richardson*,<sup>5</sup> the plaintiffs shipped nine bales of cotton from Lady's Island to Savannah, on a sloop, but only six of them were received at the defendants' warehouse, and the question was whether there had been a delivery of the whole number by the master of the vessel to the defendants. No receipt was taken for them by the master; and the defendants offered evidence of a usage of the port of Savannah that in order to constitute a delivery of water-borne goods by the carrier it was necessary for a receipt to be given by the consignee or his agent, and until then the liability of the carrier continued. It was held that this evidence was properly rejected. "The usage in question," said the court, "is objectionable and invalid, for it tends to contravene the fixed rule of law. By the common law, a carrier is discharged of his duty when he has made an actual or constructive delivery at the proper place and time. Doubtless, usage may regulate the manner of delivery, or the time when or the place where it may be made. This would be within the legitimate range of the operation of a usage. But it cannot prescribe or determine that acts which the law declares to be a delivery shall not be sufficient to constitute it. Such was the effect proposed to be given to the evidence in the case at bar. Delivery at the appointed time and place would not have proved a fulfillment of the contract if the usage was to have effect."

§ 94. **Express Companies and Delivery by.** — We have seen in a former section,<sup>6</sup> that express companies are not within the modern rule allowing common carriers to dispense with a personal delivery to the consignee. To this modification of the old law express companies owe their origin. Depositing in warehouses, whether with or without notice to the consignee or owner, with the

<sup>1</sup> *Loveland v. Burke*, 120 Mass. 139.

<sup>2</sup> *Pittsburg, etc., R. Co. v. Nash*, 43 Ind. 423.

<sup>3</sup> *Fisher v. Goddes*, 15 La. An. 14; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

<sup>4</sup> *Ante*, § 82.

<sup>5</sup> 98 Mass. 216.

<sup>6</sup> *Ante*, § 86.

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requirement that he should call for them, was found to be unsuitable for the carriage of small and valuable parcels, as well as troublesome to the consignees. To avoid this inconvenience, as well as to secure greater safety and dispatch in the transportation and delivery of valuable packages, carriers who undertook to make delivery to the consignee personally, although their line of travel might be identical with those of the water carrier and the railroad carrier, and even though they might employ the vehicles of these carriers to effect the transportation, became necessary.<sup>1</sup> Starting in the United States in 1839, in a humble way, the express business now extends into every State of the Union; is carried on by numerous wealthy and powerful corporations, with an invested capital of over thirty millions of dollars, and carrying for the government and private individuals over two billions of dollars' worth of property every year.<sup>2</sup> But precisely as these modern carriers have become rich and powerful, have they endeavored to cast off some of the duties to perform which they came into being. Among them is the duty of personal delivery; and, as will be seen presently, the courts, while showing an unwillingness to relax this obligation, have in one or two instances permitted an express company to show a usage on its part not to perform its full duties.<sup>3</sup>

§ 95. *Same — Cases where Usage did not prevail.* — In a Pennsylvania case, where a demijohn of brandy being sent from P. to K. was received by the company's agent at K. and stored in its warehouse, where it was afterwards broken, the defendant gave evidence that it was customary for the agent at K. to deliver packages at the residence of the consignee, at his option; but the court held that a personal delivery was absolutely required of expressmen, and that the defendant was liable.<sup>4</sup> In a New York case, where an expressman undertook to deliver a heavy box for the plaintiff, who lived in the fourth story of a building, by placing it within the outside door of the building, at the foot of the stairs, and notifying a boy whom he found in the office, the plaintiff not being in, it was ruled that the delivery was insufficient, and could not be cured by a usage to so deliver heavy articles. "It is very plain," said ROBERTSON, J., "that a custom so ill-defined as this should not be allowed to trench upon settled rules of law, for the weight or the bulk of the articles remains entirely uncertain; besides, it does not appear that this usage was well known to all persons dealing with such companies, nor was its origin and continuance for any length of time shown. Nor does it seem to me that such a usage could ever begin to establish a legal custom; the delivery of goods at a tavern or known stopping-place of the carrier, where they are always in charge of some one,<sup>5</sup> or on a wharf, after giving notice and allowing a reasonable time for a consignee to take possession, is entirely different from abandoning parcels intrusted to a common carrier in an exposed place and notifying the owners that they are so abandoned. It

<sup>1</sup> Hutch. on Car., § 379.

<sup>2</sup> Dinsmore v. Nashville, etc., R. Co., 10 Cent. L. J. 463.

<sup>3</sup> Marshall v. American Express Co., 7 Wis. 1; Baldwin v. American Express Co., 23 Ill. 197; American, etc., Express Co. v. Wolf, 79 Ill. 430; American, etc., Express Co. v. Schier, 55 Ill. 140; Sullivan v. Thompson,

99 Mass. 259; Packard v. Earle, 113 Mass. 280; Southern Express Co. v. Armistead, 50 Ala. 350; American, etc., Express Co. v. Robinson, 72 Pa. St. 274; Witbeck v. Holland, 45 N. Y. 13; 55 Barb. 443.

<sup>4</sup> American, etc., Express Co. v. Robinson, 72 Pa. St. 274.

<sup>5</sup> Gibson v. Culver, 17 Wend. 305.

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would in all cases be a very doubtful chance whether the owner in a fourth story or a marauder in the street would first reach the prize, even supposing the owner or his representative ready at all times to rush swiftly down-stairs, and able to carry the package up, which was too heavy for the driver; and, indeed, the box in this case does not seem to have been one which the only person notified (a boy of fourteen years of age) could have readily transported to a fourth story. The law is exceedingly jealous of any innovation upon the responsibility of common carriers, even by express contract, much more by usages, and the express business most of all requires that the most uniform and constant dereliction of duty, however successful, should not enable carriers to evade liability for a lost parcel committed to their care, by getting up a usage."<sup>1</sup>

§ 96. Same — Usage permitted to relax their Obligations. — But, notwithstanding the reasons of public policy to which the court in *Haslam v. Adams Express Company* appealed, and which must be sufficiently obvious to the student, it will be found that, "by getting up a usage," express carriers have in several instances been permitted by the courts to escape a liability to which the established rules of law would have held them. In several cases it is said that evidence of usage in such matters will be looked upon with suspicion, but that at places where the business of an express company is not sufficient to justify the keeping of a messenger, a custom on its part to substitute notice for delivery will be sufficient.<sup>2</sup> A custom of delivering packages after banking-hours has been admitted to make valid a delivery which otherwise would have been invalid,<sup>3</sup> and so of a delivery to the officer of a bank.<sup>4</sup> In two cases, decided in the same year, but in different States, usage was successfully relied upon to excuse a delivery to a person other than the one to whom the package was addressed. In *Southern Express Company v. Everett*,<sup>5</sup> a small paper box containing a diamond breastpin, and addressed "Miss Theodosia Everett, Female College, Macon, Ga.," was delivered to the agent of the company at Fort Valley, Georgia, for transportation to the address given. The box was duly transmitted to Macon, and delivered to Dr. Bonnell, the president of the female college, unopened; and he handed it to Miss Everett, who opened it and found the breastpin wanting. Miss Everett was a student at the college. In a suit for the loss, the trial court charged the jury that the delivery to Dr. Bonnell was not a legal delivery which would discharge the defendants. But the Supreme Court of Georgia reversed the case, WARNER, C. J., saying: "The general rule is that the responsibility of the carrier ceases with the delivery of the goods at destination, according to the directions of the shipper or according to the custom of the trade. A delivery of goods to a duly authorized agent of the owner or consignee is a sufficient delivery. The person to whom the box was addressed, the record shows, was a student in the college under the charge of Dr. Bonnell, and, as we infer from the record, was a minor. Was it one of the rules of the college that all articles and communications addressed to the

<sup>1</sup> *Haslam v. Adams Express Co.*, 6 Bosw. 235.

<sup>2</sup> *Baldwin v. American Express Co.*, 23 Ill. 199; *American, etc., Express Co. v. Schier*, 55 Ill. 140; *Gulliver v. Adams Express Co.*, 38 Ill. 593.

<sup>3</sup> *Marshall v. American Express Co.*, 7 Wis. 1.

<sup>4</sup> *Hotchkiss v. Citizens' Bank*, 42 Barb. 517.

<sup>5</sup> 37 Ga. 688.

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students therein should be first delivered to the president thereof? What was the custom of the president of this college in receiving parcels addressed to the students under his charge, from the defendant? If it was the custom for Dr. Bonnell, the president of the college, to receive from the defendant parcels directed to the students therein under his charge, and receipt therefor, or if it was in accordance with the rules of the college that he should do so, then he might properly be considered as the authorized agent of the students under his charge for that purpose, and the jury might presume a good delivery of the parcel to the student of the college to whom it was addressed, when delivered to the president thereof." In *Sullivan v. Thompson*,<sup>1</sup> a box marked "Wm. Sullivan, Government Bakery, Washington, D. C.," upon arrival at Washington was delivered by the defendants' agent to one Everett, a clerk in the government bakery in which Sullivan was employed. When the box was delivered to the clerk, the plaintiff was not present in the office, nor was he sent for; and the box never came into his hands. On the trial, the defendants offered to show that during the period while Everett was clerk at the bakery it was the uniform usage for all expressmen bringing parcels there, addressed to any of the men there employed, to deliver the same at the office to some one of the clerks therein at the time, taking his receipt therefor, without notice to the consignee; but the judge excluded the evidence. This was held, on appeal, to be error. "All their reasonable usages," said CHAPMAN, C. J., "would enter into their contract and become a part of it, and their liability would be limited by such usages. These usages consist in methods of doing business; and when a party employs them to carry a package, and asks for no special stipulation, his implied proposal is that they shall carry and dispose of the package in the same manner as they are accustomed to do with such packages, provided it be reasonable; and this is the proposal which they impliedly accept, and it constitutes the contract, except so far as it is varied by express stipulations. Some of their usages are adopted with reference to the compensation charged by them. It is important to the public that goods be carried as cheaply as possible, and in order to meet this want it is expedient to adopt usages which shall save expense. The usage may relate to the delivery of goods. The usage of the defendant in this respect is stated in the report. The only question that can arise respecting it is, whether it is reasonable. This must depend somewhat upon the character of the property to be delivered. If it were a heavy article, of no great value, and which might safely be left exposed, it might be reasonable to leave it on the premises where the consignee resides, in an exposed position. On the other hand, if it were a package of money, or article of similar value, it might not be reasonable to deliver it even at the office or counting-room of the consignee without putting it in the care of some reliable person. In the present case it was a box of clothing. It was delivered within business hours at the office of the government bakery, which was the only part of the bakery where the defendants' agents could go, to a government clerk there employed, who alone occupied the office and had charge there, and who received the parcel for the plaintiff and gave a receipt therefor. This was in conformity with the well-known usage of the managers of the bakery and with the usage of the defendants. Considering the nature of the property and the circumstances, the court are of opinion that

<sup>1</sup> 99 Mass. 239.

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the usage was not unreasonable, and that defendants fulfilled their contract if they delivered the box in conformity with it." The conclusion in this case may be correct; but the remarks of the chief justice indicate a readiness on his part to carry the usages of trade, and especially those of common carriers, to an extreme and dangerous point. When, subsequently, in the same court, *Sullivan v. Thompson* was cited, ENDICOTT, J., remarked that "it was decided on the peculiar circumstances and facts of the case, and has no application to the question raised here," and the court (Chief Justice CHAPMAN not then being a member) held that a usage on the part of expressmen to leave packages at a way-station, and to substitute a notice of the arrival of the goods for a personal delivery, could not bind the consignor unless known to him.<sup>1</sup> Yet it is to be observed that the court was still prepared to uphold the usage, had it been proved to have come to the knowledge of the plaintiff before he made the contract. But why should express companies be permitted to set up a usage on their part doing away with the necessity of a personal delivery? They were established for the purpose of extending to the public the advantages of a personal delivery in cases of land carriage, which, prior to the introduction of the railroad, were enjoyed by the public. A custom of an express company not to be liable as an express company is absurd, and should not be recognized by the courts. Such a custom may well be considered as one contrary to public policy, and as such, as we shall presently see, void.<sup>2</sup>

The obligation of an expressman, on the refusal of the goods, to give notice thereof to the consignor,<sup>3</sup> may be excused by custom.<sup>4</sup> Where it is the custom of an express company to enter all packages before delivery in a delivery-book, and upon which a receipt is taken upon the delivery, if no such entry has been made upon the delivery-book it will not be presumed that the company has done its duty.<sup>5</sup>

§ 97. **Connecting Carriers.**—A shipper is bound by the custom of a carrier not to be liable for a package delivered to him beyond the limits of his own line, but that upon his placing it in the hands of a connecting carrier his liability shall cease.<sup>6</sup> A custom that an intermediate carrier, who receives property subject to charges, may deduct from the freight earned by a prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, is not valid, because contrary to law and unreasonable.<sup>7</sup> Where there is a bill of lading given by a carrier to the terminus of his line, of goods addressed to a point beyond, he may show a custom in such cases to deliver to a connecting carrier.<sup>8</sup> Where it is the general custom of the carrier to forward all goods destined beyond his line by

<sup>1</sup> Packard v. Earle, 113 Mass. 280.

<sup>2</sup> Post, Chap. V.

<sup>3</sup> Kremer v. Southern Express Co., 6 Coldw. 356; Mayell v. Potter, 2 Johns. Cas. 371; Fisk v. Newton, 1 Denio, 45; American, etc., Express Co. v. Wolf, 79 Ill. 430.

<sup>4</sup> Wood v. Barney, 45 N. Y. 344.

<sup>5</sup> Baldwin v. American Express Co., 23 Ill. 197.

<sup>6</sup> Van Santvoord v. St. John, 6 Ill. 157; Indianapolis, etc., R. Co. v. Murray, 72 Ill. 128.

<sup>7</sup> Strong v. Grand Trunk R. Co., 15 Mich. 206.

<sup>8</sup> Hooper v. Chicago, etc., R. Co., 27 Wis. 81.



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sailing-vessels, he is not liable for not forwarding particular articles by steam-vessels, unless distinctly ordered to do so.<sup>1</sup> But where the usage is for the carrier to deliver beyond the terminus of his own line, he will be responsible in accordance with the usage.<sup>2</sup>

§ 98. *The Carrier's Charges.* — The carrier's reward, — viz., the amount which he is entitled to receive for his services, — if not fixed by agreement, will be regulated by custom; and, ordinarily, he can only recover his customary charges.<sup>3</sup> If a carrier does not stipulate in advance for the rate and terms of his compensation, he is entitled to demand and receive what is usual in the given case. If he rely upon usage and custom for the rate of compensation, and they allow none in the given case, he will be entitled to none.<sup>4</sup> A carrier's charges being higher for "wrought" than for "unwrought" marble, evidence that the usage among manufacturers, dealers, and carriers was to class marble cut into slabs as "unwrought," was held to be properly received, in a Michigan case, where the question was whether the carrier was entitled to claim freight on the goods in question as "wrought marble."<sup>5</sup> In an English case, the plaintiff brought an action for money had and received in respect of certain alleged overcharges for certain packed parcels. The plaintiff's business was to collect parcels from different tradesmen, to put the parcels into one package, and to send it by the defendants' railroad. It was proved that the defendants issued a tariff of their rates, and that the plaintiff was charged under it for "packed parcels." On the trial, evidence was given (subject to defendants' objections) that four wholesale houses in London were in the habit of sending packages containing their own goods and also the goods of other tradesmen, and that they were never charged for packed parcels, but at a less rate. The houses in question were not asked as to the contents of their packages, and it did not appear that the company had direct information on the point. Evidence was also given that in 1849 (the action was brought in 1865) it was proved, at an arbitration in the presence of defendants' solicitor, that it was the practice of the London houses to send packed parcels, without charge, by the defendants; and the following question was allowed by the court: "Has this practice of packing parcels been notorious?" and it was answered, that for the last forty years it had been so general as to be notorious among carriers. The judge directed the jury that the above was evidence upon which they might find that parcels had been carried by the defendants for other persons, containing goods of a like description, and under like circumstances, at a less rate; and also upon which they might find that the defendants knowingly charged the plaintiff more than others, and that if the jury believed that the defendants knowingly and purposely charged the plaintiff at a higher rate upon a packed parcel than other persons, they ought to find a verdict for the plaintiff. The Court of Exchequer Chamber (ERLE, C. J., dissenting) held the evidence properly received and the direction correct.<sup>6</sup> In a

<sup>1</sup> *Simkins v. Norwich Steamboat Co.*, 11 Cush. 102.

<sup>2</sup> *Knapp v. United States Express Co.*, 55 N. H. 348.

<sup>3</sup> *Ang. on Car.*, §§ 124, 356, 392; *Bastard v. Bastard*, Show. 81; *Holford v. Adams*, 2 Duer, 471; *Weber v. Kingsland*, 8 Bosw. 418.

<sup>4</sup> *Kirtland v. Montgomery*, 1 Swan, 452.

<sup>5</sup> *Bancroft v. Peters*, 4 Mich. 619.

<sup>6</sup> *Sutton v. Great Western R. Co.*, 11 Jur. (N. S.) 879. And see *Lewis v. Marshall*, 7 Man. & G. 729, where the evidence offered was held insufficient to prove that, by the usage of the trade, steerage-passengers on a ship were considered as "cargo" and their passage money as "freight."



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South Carolina case it was held that, in an action to recover freight for carrying the defendant's rice from his plantation to Charleston, the latter might give evidence of a custom on the river to look to the produce and consignee alone for freight.<sup>1</sup>

Where freight is paid in advance, and in consequence of the capture or shipwreck of the vessel, or other cause not imputable to the consignor,<sup>2</sup> the goods are not carried to their destination, the freight is not earned, and may be recovered back,<sup>3</sup> unless there be an express contract to the contrary.<sup>4</sup> This rule, it is held in *Emery v. Dunbar*,<sup>5</sup> cannot be altered by usage. The defendants' ship, on which were the plaintiffs' goods, was destroyed by a Confederate cruiser. In a suit for the freight, which they had paid before the sailing of the vessel, the defendants set up "that at the time of the payment of the freight it was, and from time immemorial thereuntil had been, the custom and usage of the United States of America and of the State of New York, and of the ship-owners, shippers, and merchants of, and of the shippers from the said United States of America and State of New York, that said freight so paid in advance is paid unconditionally, and not subject to the risk of the voyage, and is not repaid, but is retained by the ship-owner, provided that the goods be taken on board and the voyage commence or have commenced." The plaintiffs demurred to this answer; the demurrer was sustained, and on appeal this ruling was sustained. "Where a general rule or principle of law like this," said the Supreme Court, "has been long and well established, it cannot be controlled by proof of any usage to the contrary. This disposes of the defendants' answer." In the older case of *Frith v. Barker*<sup>6</sup> (1807), one hundred and ninety hogsheads of sugar had been shipped at S. to be delivered at N.; but during the voyage, owing to a leak in the ship, the contents of fifty of them were lost, and but a hundred and forty were received by the consignee, who refused to pay freight on the residue. In a suit for the freight on the fifty hogsheads, the plaintiff offered to prove that by the usage of merchants at N., freight was payable for the empty casks, under the circumstance of this case. A verdict being taken by consent for the full amount, subject to the opinion of the Supreme Court, it was there held that the plaintiff was entitled to a verdict for only one hundred and forty casks. KENT, C. J., who delivered the opinion of the court, after stating the law to be that no freight is due for goods which are destroyed during the voyage, said: "The next point is whether evidence of usage in contradiction to this rule was admissible; and if it was, whether the usage proved went the length of establishing that freight was in this case due for the sugar that was destroyed. \* \* \* The testimony did not show that this usage

<sup>1</sup> *Middleton v. Hayward*, 2 Nott & M. 9. And see *Hayward v. Middleton*, 3 McCord, 121.

<sup>2</sup> *Detouches v. Peck*, 9 Johns. 210; *Giles v. The Cynthia*, 1 Pet. Adm. 207; *Griggs v. Austin*, 3 Pick. 20.

<sup>3</sup> *Minurn v. Warren Ins. Co.*, 2 Allen, 86; *Benner v. Equitable, etc., Ins. Co.*, 6 Allen, 222; *Chase v. Alliance Ins. Co.*, 9 Allen, 311; *Manfield v. Maitland*, 4 Barn. & Ald. 582; *Pitman v. Hooper*, 3 Sumn. 66; *Watson v. Duykinck*, 3 Johns. 337; *Mashiter v. Buller*,

1 Camp. 84; *Griggs v. Austin*, 3 Pick. 20; *Phelps v. Williamson*, 5 Sandf. 578; *Lawson v. Worms*, 3 Cal. 365; *Cope v. Dodd*, 13 Pa. St. 33; *Brown v. Harris*, 2 Gray, 359.

<sup>4</sup> *De Sylva v. Kendall*, 4 Mau. & Sel. 37; *Jackson v. Isaacs*, 3 Hurl. & N. 405; *Hicks v. Shield*, 7 El. & Bl. 633; *Atwell v. Miller*, 11 Md. 348; *Kinsman v. New York Ins. Co.*, 5 Bosw. 460.

<sup>5</sup> 1 Daly, 408.

<sup>6</sup> 2 Johns. 327.

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existed if the contents of the casks had been lost by the means of the sea perils during the course of the voyage. I presume that no such usage exists. It would be repugnant to the general rule of the maritime law. The true import of the testimony offered was, that the master is entitled to his freight notwithstanding the ordinary diminution of an article, arising either from its nature or the defect of the cask. It becomes, therefore, immaterial to examine whether this evidence of usage was or was not strictly competent; but as the question is frequently suggested, it may be proper to observe that though usage is often resorted to for explanation of commercial instruments, it never is or ought to be received to contradict a settled rule of commercial law."

§ 99. **Power of Carrier to sell Goods in his Charge.**—Except in cases of emergency and necessity,<sup>1</sup> a carrier has no authority whatever to sell the goods intrusted to his care; and a sale by him without express authority can pass no title, even to a purchaser in good faith and for a fair price,<sup>2</sup> and although the sale may have been for the purpose of realizing his unpaid charges.<sup>3</sup> But the usage of the trade may alter this rule, and render such sales valid to protect the purchaser.<sup>4</sup> In a Massachusetts case, however, where a master of a stranded vessel had sold the goods, instead of having made an effort to carry them to another port, where they would have realized a much better price, the court ruled that the sale was not under necessity, was therefore void, and was not helped by a usage for the master of a stranded vessel to sell the cargo without necessity. "Necessity only," said PUTNAM, J., "will authorize the sale. A usage to sell without necessity would be void."<sup>5</sup>

§ 100. **The Carrier's Lien as affected by Usage.**—The carrier has at common law, as security for compensation for his labors and for any advances which he may have made for the benefit of the goods in his charge, a lien upon such goods; that is, a right to retain possession of them until his charges have been paid or tendered. This lien, however, extends only to charges and advances upon the particular goods upon which it is claimed, and is called a particular lien, for the law does not allow him a general lien for any balance which may be due to him from the owner on other accounts or transactions between them. The courts have been said to guard jealously the limits of this rule, and to refuse to allow an extension of it.<sup>7</sup> Therefore, while permitting the carrier to avail himself of a general lien by an express contract, they have refused to allow him its advantages from a simple notice from him to his customers that

<sup>1</sup> *Notara v. Henderson*, L. R. 5 Q. B. 346; *Arthur v. The Cassius*, 2 Story, 81; *Pope v. Nickerson*, 3 Story, 465; *Post v. Jones*, 19 How. 150; *The Gratitude*, 3 Rob. Adm. 240; *The Voloria*, 3 Ware, 139; *The Mohawk*, 8 Wall. 153.

<sup>2</sup> *Lickbarrow v. Mason*, 6 East, 21; *White v. Webb*, 15 Conn. 302; *McCombie v. Davies*, 6 East, 538; *Agnew v. Johnston*, 22 Pa. St. 471; *Powell v. Buck*, 4 Strobb. 427; *Swift v. Moseley*, 10 Vt. 208; *Lecky v. McDermott*, 8 Serg. & R. 500; *Kitchell v. Vanadar*, 1 Blackf. 356; *Doane v. Russell*, 3 Gray, 382;

*Hoffman v. Noble*, 6 Metc. 68; *Bailey v. Shaw*, 24 N. H. 297.

<sup>3</sup> *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Hunt v. Haskell*, 24 Me. 339; *Indianaapolis, etc., R. Co. v. Herndon*, 81 Ill. 143.

<sup>4</sup> *Taylor v. Wells*, 3 Watts, 65; *Rapp v. Palmer*, 3 Watts, 178; *Pickering v. Busk*, 15 East, 44; *Bryant v. Commercial Ins. Co.*, 6 Pick. 131; *Kemp v. Coughtry*, 11 Johns. 107.

<sup>5</sup> *Bryant v. Commercial Ins. Co.*, 6 Pick. 131.

<sup>6</sup> *Rushforth v. Hadfield*, 6 East, 622; *Hartshorne v. Johnston*, 2 Halst. 108.

<sup>7</sup> *Ang. on Car.*, § 357; *Hutch. on Car.*, § 47.

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he will transport their goods only on that condition.<sup>1</sup> Yet before usage the courts have given way, and permitted this "encroachment upon the common law" to flourish, though they did not recede without a struggle. In *Rushforth v. Hadfield*,<sup>2</sup> which arose in the King's Bench in 1805, at the trial before GRAHAM, B., of an action of trover, the defendant's counsel offered evidence to show that by the usage of the trade throughout the realm, common carriers had a right to retain particular goods belonging to a party for their general balance, due from the same party for the carriage of other goods belonging to him. A number of witnesses were called to prove the usage, among them the defendant's book-keeper, who testified to two instances in twenty years. Five other carriers were introduced, who remembered a number of cases in which they had held goods for a general balance till it was paid. The plaintiffs insisted that the evidence did not show a general usage, but GRAHAM, B., thought that, being uncontradicted, it admitted of that conclusion, and directed the jury that if they found that such was the general, undisputed usage, it established the right of the carriers. The jury found for the defendants, but on application to the King's Bench a rule absolute was granted for a new trial. All the judges thought the verdict ought not to stand. Lord ELLENBOROUGH, C. J., said: "There was no sufficient evidence on which the jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefore paid, by force of which he has a lien only for the carriage price of the particular goods. Then, what proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage for the carrier to let out of his hands the particular parcel on which his common-law lien attaches, without receiving the carriage price of it at the time, upon a general agreement, of which such usage would be evidence, that he may retain any parcel belonging to the same party for the whole of his demand; but such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common-law right of the subject. But if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the jury in this view of it. There had been previous dealing between these parties, and there might have been evidence to show, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered; but that was not resorted to, but it was left to the jury as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularized was not above five years ago; and but one instance, and that only

<sup>1</sup> *McFarland v. Wheeler*, 26 Wend. 467;<sup>2</sup> 6 East, 522.*Kirkman v. Shawcross*, 6 Term Rep. 14;*Wright v. Snell*, 5 Barn. & Ald. 350.

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two years ago, of the exercise of the claim to any considerable amount, so as to make it worth while to resist it. To justify, however, so extensive a claim upon the ground of general usage, there ought to be evidence of instances more ancient, more numerous, and more important." GROSE, J.: "I should object to making a precedent in a case of this sort, where a general conclusion is to be drawn from such insufficient premises. A carrier may have a lien either at common law for the carriage of the particular goods, upon which there is no question, or it may arise out of the usage of trade, or by a particular contract between the parties concerned. If it could be claimed by the general usage of trade, I should rather have thought that it should have been coeval with the common-law liability of the carrier; but, at any rate, there was no evidence here sufficient to warrant the jury in finding any such general usage in trade. And as to any lien in respect of a particular contract, it was not left to the jury on that ground." LAWRENCE, J.: "I agree that there ought to be a new trial. Common carriers are every day attempting to alter the situation in which they have been placed by the law. At common law they are bound to receive and carry the goods of a subject for a reasonable reward, to take due care of them in their passage, and to deliver them in the same condition as when they were received; but they are not bound to deliver them without being paid for the carriage of the particular article, and therefore they have a lien to that extent. Of late years, however, they have been continually attempting to alter their general character, by special notices on the one hand to diminish their liability, and on the other hand by extending their lien. But what evidence have we in this case to say that their common-law situation is altered? To do that, it must be shown that both parties have consented to the alteration; the carrier cannot alter his situation by his own act alone. It is said that a general lien is convenient to the parties concerned. I do not say that it may not be so, but it must arise out of the contract of the parties. It may be convenient enough for the customer to say that in consideration that you—the carrier—will give up your right to stop each particular parcel of goods for the price of the carriage, I will agree that you may stop any one parcel of my goods for the carriage price of all together. But still this must be by contract between them; and usage of trade is evidence of such a contract. And where such a usage is general, and has been long established, so as to afford a presumption of its being commonly known, it is fair to conclude that the particular parties contracted with reference to it. Then, if in this case there had been evidence of a usage so uniform and frequent as to warrant an inference that the parties contracted with reference to it, it should have been left to the jury to infer that it was part of their contract." LE BLANC, J.: "I doubt whether the jury had this case presented to them in the true light in which, by law, it should have been, for it was left to them to find for the defendants upon the bare ground of there being evidence of a general usage amongst carriers to retain for their general balance; but no usage of carriers would be sufficient to bind other parties, unless it were so general as to warrant an inference that the party who dealt with a carrier had knowledge of it, and so to warrant a conclusion that he contracted with a carrier on that ground. General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors, instead of coming

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in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionately amongst all the creditors, and they ought not to be encouraged. But I do not mean to say that a usage in trade may not be so general and well established as to induce a jury to believe that the parties acted upon it in their particular agreement; and I cannot say that such an agreement would not be good in law, although a carrier might have no right to refuse carrying goods for another without an agreement that he should have a lien for his general balance, for that would be contrary to the obligation which the law has imposed on him. The instances of detainer by carriers for the general balance which were proved at the trial were very few and recent, with a view to found so extensive a claim; and the instance where goods of the value of £10,000 were detained for £130 does not appear to me to assist the claim, for the parties would naturally rather pay £130—the amount of the balance due to the carrier—than have goods of such great value detained from them till the questions were decided at law. Without saying, therefore, that there may not be such a usage as that insisted on, I am clearly of opinion that there should be a new trial, in order to have the case submitted to the jury on its true ground, which it does not appear to have been upon the last trial." On a second trial, the jury found a verdict for the plaintiffs, and a rule being obtained to set it aside, was discharged.<sup>1</sup> But twenty-two years later, in *Holderness v. Collinson*,<sup>2</sup> the same court said: "Where the usage is general, and prevails to such an extent that a party contracting must be supposed to be conversant of it, then he will be bound by the terms of that usage;" and it may now be considered as settled that carriers may, by the long-established and well-known usages of particular localities, or of particular classes of those engaged in that business, become entitled to retain the goods which come into their custody, for general balances.<sup>3</sup>

Still another fundamental rule as to the carrier's lien may be altered by custom and usage. It is a general rule that credit given by a carrier to the employer for the price of the transportation, beyond the time when the goods transported are to be delivered by the carrier, is inconsistent with, and will defeat the lien.<sup>4</sup> In *Raitt v. Mitchell*,<sup>5</sup> the defendants claimed a lien for repairs on the plaintiff's ship. There was no agreement as to when the repairs were to be paid for, and consequently the defendants' right seemed to be clear. But the plaintiff having proved that, by the usage of the trade, where there was no express contract as to the time of payment, the ship-owner gives credit for repairs, Lord ELLENBOROUGH ordered a verdict in his favor, saying: "I am of opinion that in this case the defendants had no right to detain the plaintiff's ship. It is distinctly proved that where there is no express stipulation for a ready-money payment, credit is invariably given by shipwrights in the river Thames. The period of credit varies in the different trades in which ships are employed; but in each trade it appears to be uniform, and for the repairs of

<sup>1</sup> East, 224.

<sup>2</sup> 7 Barn. & Cress. 212. See also *Rex v. Humphrey*, 1 McCl. & Y. 191.

<sup>3</sup> Hatch, on Car., § 477.

<sup>4</sup> *Pinney v. Wells*, 10 Conn. 104; *Raitt v.*

*Mitchell*, 4 Camp. 145; *Cowell v. Simpson*, 16 Ves. 275; *Chandler v. Belden*, 18 Johns. 157; *Lucas v. Nockells*, 4 Bing. 729.

<sup>5</sup> 4 Camp. 145.

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Indiamen we are told it is eighteen months, at the expiration of which time it is expected they shall have returned from their voyages and put funds into the hands of their owners by the freight they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect. In that case it seems to be admitted that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that he has a lien, like other artificers. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired." So, in a later case, where goods were landed upon a wharf in October, and by usage the wharfage was not paid until Christmas, it was held that there could be no lien.<sup>1</sup> It has been held in the Supreme Court of the United States that a frequent and general, but not universal practice in a particular port, on the part of ship-owners, to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid, is not such a custom as will displace the right of the carrier to demand freight on the delivery of goods on the wharf.<sup>2</sup>

§ 101. **Bills of Lading and restrictive Contracts.** — Where the terms of a bill of lading or other similar contract have acquired by usage a particular meaning, the parties will be presumed to have used them in that sense.<sup>3</sup> But the usage must be uniform; and, therefore, if carriers on a particular river sometimes give bills of lading containing an exemption from loss by fire, and at other times containing no such exemption, such a usage is not established, because not uniform; and this, although in a majority of cases the exception was contained in the bills of lading.<sup>4</sup> It has been expressly ruled in several cases that the common-law liability of a carrier cannot be restricted by anything less than a contract, and that a usage on the part of the carrier not to receive goods on any other terms than on those of a limited liability cannot be invoked for his protection in any case.<sup>5</sup> Thus, a usage not to be liable for accidental losses by fire,<sup>6</sup> and not to accept looking-glasses for transportation without exemption from breakage,<sup>7</sup> have been held inadmissible. So, the sending of goods under a restrictive contract in any number of instances does not bind the party sending them to a similar contract in the future, without his agreement to that effect;<sup>8</sup> though upon this point it is

<sup>1</sup> *Crawshay v. Homfray*, 4 Barn. & Ald. 50.

<sup>2</sup> *The Eddy*, 5 Wall. 481.

<sup>3</sup> *Wayne v. The General Pike*, 16 Ohio, 421; *Rawson v. Holland*, 50 N. Y. 611.

<sup>4</sup> *Cooper v. Berry*, 21 Ga. 526; *Berry v. Cooper*, 23 Ga. 543.

<sup>5</sup> *Illinois, etc., R. Co. v. Smyser*, 38 Ill. 354; *The Pacific*, 1 Dundy, 71; *Coxe v. Heisley*, 19 Pa. St. 243; *Clyde v. Graver*, 34 Pa. St. 251; *Garey v. Meagher*, 33 Ala. 630; *Evansville,*

*etc., R. Co. v. Young*, 28 Ind. 516; *United States Express Co. v. Rush*, 24 Ind. 100; *Patton v. Magrath*, *Dudley* (S. C.) 154; *Pitre v. Offutt*, 21 La. An. 679; *Cranwell v. The Fanny Fosdick*, 15 La. An. 436.

<sup>6</sup> *Illinois, etc., R. Co. v. Smyser*, 38 Ill. 354.

<sup>7</sup> *The Pacific*, 1 Dundy, 71.

<sup>8</sup> *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79; *Erie, etc., Transp. Co. v. Dater*, 8 Cent. L. J. 293.



## Capacity and Assent.

remarked by the Supreme Judicial Court of Massachusetts: "We do not mean to be understood as saying that such assent and acquiescence may not be shown by evidence drawn from a long and uniform course of dealing between the parties, in connection with other circumstances leading to the inference that a notice of a restricted liability on the part of the carrier was recognized by the other party as constituting the agreement on which the contract of carriage was to be performed. But such dealing and recognition must be tantamount to a clear assent to the terms of the notice on the part of the owner and consignor, or it will fall short of establishing a limitation on the common-law liability of the carrier."<sup>1</sup> And, though contrary to an Illinois case already referred to,<sup>2</sup> it has been ruled in New York that while a carrier cannot vary the liability which attaches upon the receipt of goods for transportation without qualification, by the delivery of a subsequent bill of lading containing conditions, yet this rule will be different if the parties have been in the habit of transacting their business in that way.<sup>3</sup>

§ 102. **Statutory Exemptions cannot be waived by Usage.**—The United States statute of March 3, 1851, exempting the owners of vessels, in case of loss by fire, from liability for the negligence of their officers or agents in which the owners have not directly participated, provides that nothing in the act "shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It has been held by the Supreme Court of the United States that the contract mentioned in the proviso must be one which shows upon its face that it is so intended, and not one which may be construed by custom to so intend.<sup>4</sup>

## III. CORPORATIONS.

§ 103. **The Ancient Doctrines concerning Corporate Capacity and Assent as affected by Usage.**—It was an ancient doctrine of the common law that corporations could express their assent only by means of their seal, and they were therefore considered incapable of making contracts, or of appointing agents or attorneys to do any binding acts, except by a deed or power in writing under their corporate seal.<sup>5</sup> This doctrine is now obsolete, but it owes its extinction not to the courts, but to the practices of the corporations themselves, whose usages the judges were compelled to follow. "However well established this may have been as a rule of the courts, its extreme inconvenience must always have effectually denied it currency as a rule of practice. It can hardly be believed that in their daily commerce, for the necessities and elegancies of life: for the decoration of their chapels and churches; for the building and repairing of their houses, and the tillage and improvement of their lands, the various religious communities, anciently so numerous and so well endowed in England, contracted only by deed. Of necessity, their superior and authorized agents must have bought and sold, bargained and contracted for them without the

<sup>1</sup> *Perry v. Thompson*, 98 Mass. 249.

<sup>2</sup> *Illinois, etc., R. Co. v. Smyser*, 38 Ill. 354.

<sup>3</sup> *Shelton v. Merchants' Despatch Transp. Co.*, 36 N. Y. S. C. (J. & S.) 527.

<sup>4</sup> *Walker v. Transportation Co.*, 3 Wall. 150.

<sup>5</sup> *Case of the Dean of Fernes, Davies*, 121; *Manby v. Long*, 3 Lev. 107; *Horn v. Ivy*, 1 Vent. 47; *Bailiffs, etc., of Ipswich v. Martin*, Cro. Jac. 411; *Arnold v. Mayor*, 4 Man. & G. 893; *Taylor v. Dulwich Hospital*, 1 P. Wms. 655.



## Corporations.

delaying intervention of sealed instruments. Municipal corporations, too, whose bargains and purchases must have been numerous in the most ancient times for the improvement and defence of their towns, for articles of civic pomp and display, can hardly be supposed to have contracted for them in all their details by deed.<sup>1</sup> How, little by little, the strictness of the old rule was broken in upon by permitting at first matters of small moment, and at length transactions of more importance, to be legal and valid, without the formality of a deed, may be traced by the student who has leisure to examine the old cases; but to-day they are of value only as history.<sup>2</sup> No such technical rule has hampered in this country the business relations of individuals with corporations, since it was laid down in the leading case of *Bank of Columbia v. Patterson*,<sup>3</sup> by the Supreme Court of the United States, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. Accordingly, a corporation may be bound by the acts of its agents although not under its corporate seal, and even where they are not reduced to writing, except in those cases where, by the provisions of the Statute of Frauds or otherwise, a contract must be in writing to render it valid, if made by a private person.<sup>4</sup>

§ 104. **Officers and Agents of Corporations.**—Although, as has been said, according to the ideal of a corporation, every act must be done by those who represent it, yet many of its officers may do many things to bind the company, in the line of their duties and sanctioned by usage; otherwise, there would be no such thing as getting on with business.<sup>5</sup> The powers and acts of agents and

<sup>1</sup> Ang. & Ames on Corp., § 228.

<sup>2</sup> *Maxwell v. Dulwich Hospital*, 4 L. J. (Ch.) 131; *Smith v. Birmingham Gas-Light Co.*, 3 Nev. & M. 771; *Mayor of Thetford's Case*, 1 Salk. 191; 3 Salk. 103; *Arnold v. Mayor of Poole*, 4 Man. & G. 893; *Rex v. Bigg*, 3 P. Wms. 419; *Yarborough v. Bank of England*, 16 East, 6; *East London Water-Works v. Bailey*, 4 Bing. 283; *Edwards v. Grand Junction Canal Co.*, 1 M. & Cr. 659; *Smith v. Cartwright*, 6 Exch. 927; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *London, etc., R. Co. v. Winter*, 1 Cr. & Ph. 57; *Doe v. Bold*, 11 Q. B. 129; *Harper v. Charlesworth*, 4 Barn. & Cress. 575.

<sup>3</sup> 7 Cranch, 299.

<sup>4</sup> *American Ins. Co. v. Oakley*, 9 Paige, 496; *Hamilton v. Locomotive Ins. Co.*, 5 Pa. St. 344; *Conroe v. Port Henry Iron Co.*, 12 Barb. 53; *Bank of the United States v. Norwood*, 1 Har. & J. 426; *Fleckner v. United States Bank*, 8 Wheat. 357; *Osborn v. United States Bank*, 9 Wheat. 738; *Union Man. Co. v. Pitkin*, 14 Conn. 174; *Bank of the United States v. Dandridge*, 12 Wheat. 83; *Everett v. United*

*States*, 6 Port. 182; *Savings Bank v. Davis*, 8 Conn. 202; *Dunn v. Rector of St. Andrew's Church*, 14 Johns. 118; *Overseers v. Overseers*, 3 Serg. & R. 117; *Palm v. Medina Ins. Co.*, 20 Ohio, 537; *San Antonio v. Ferris*, 9 Texas, 69; *Eastman v. Coos Bank*, 1 N. H. 26; *Bates v. Bank of Alabama*, 2 Ala. 452; *Sheldon v. Fairfax*, 21 Vt. 102; *Legrand v. Hampden College*, 5 Munf. 324; *White v. Westport Cotton Man. Co.*, 1 Pick. 215; *Garvey v. Colcock*, 1 Nott & M. 231; *Petrie v. Wright*, 6 Smed. & M. 647; *Baptist Church v. Mulford*, 3 Halst. 182; *Buncombe Turnpike Co. v. McCarron*, 1 Dev. & B. 310; *Abbot v. Hermon*, 7 Greenl. 118; *Waller v. Bank of Kentucky*, 3 J. J. Marsh. 201; *Lee v. Trustees of Flemingsburg*, 7 Dana, 28; *Commercial Bank v. Newport Man. Co.*, 1 B. Mon. 14; *Danforth v. Schoharie Turnpike Co.*, 12 Johns. 230. *Contra*, *Frankfort Bank v. Anderson*, 3 A. K. Marsh. 932.

<sup>5</sup> *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *First National Bank v. Hogan*, 47 Mo. 472; *Fayles v. National Ins. Co.*, 49 Mo. 350.

## Usage as to Contracts.

officers of corporations acquired by usage and rendered valid by custom are discussed in another place.<sup>1</sup>

§ 105. **Contracts not according to Mode prescribed — Usage.** — Where the charter of a corporation prescribes the particular mode in which its contracts shall be made, that mode must be pursued.<sup>2</sup> For the same reason, however, which made it necessary to relax the ancient rules as to the mode in which a corporation was required to act, and which have been stated in a previous section, this rule has been modified, and corporate bodies have been held liable on engagements entered into by their agents, though in a different manner from that prescribed by their charters or articles of association. In the following cases the corporations have been rendered liable on instruments issued and contracts made by them, on proof of usage: An insurance company, on a policy signed by the president and countersigned by his assistant, its charter providing that "all policies of insurance made by said company, signed by the president, or in his absence by the assistant and countersigned by the secretary shall be binding on the company."<sup>3</sup> An insurance company, on a bill of exchange signed only by its president, the act of incorporation providing that "all notes and contracts signed by the president and countersigned by the secretary shall be binding on the corporation."<sup>4</sup> A bank, on a certificate of deposit signed by the cashier only, the law under which it was incorporated requiring that "contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president and vice-president and cashier thereof."<sup>5</sup> A banking corporation, on a contract for services executed by a less number of directors than the legal number.<sup>6</sup> An insurance company, on an agreement signed by an agent giving the policy-holder permission to remove his property, although the charter of the company required that all agreements in relation to insurance should be signed by the president and secretary of the company.<sup>7</sup> An insurance company, on a parol contract made by its agent, although by its charter authorized only to make contracts by the signature of its president, or such other person as its rules and by-laws should direct.<sup>8</sup> An insurance company, on a promise not under seal, it being only authorized to "borrow money and issue its bonds therefor."<sup>9</sup> A banking corporation, on a bill of exchange indorsed by its cashier, though the charter declared that its funds should in no case be liable for any contract or engagement whatever unless the same should be signed by the president and countersigned by the

<sup>1</sup> See Banks and Banking, *ante*, §§ 65-67.

<sup>2</sup> Ang. & Ames on Corp., § 250; British Assur. Co. v. Brown, 12 C. B. 723; Dawes v. North River Ins. Co., 7 Cow. 462; Head v. Providence Ins. Co., 2 Cranch, 127; Hill v. Manchester Water-Works Co., 2 Nov. & M. 573; 3 Barn. & Cross. 866.

<sup>3</sup> Bulkley v. Derby Fishing Co., 2 Conn. 252; *ante*, p. 145.

<sup>4</sup> Witte v. Derby Fishing Co., 2 Conn. 280. And see Safford v. Wyckoff, 4 Hill, 442.

<sup>5</sup> Barnes v. Ontario Bank, 19 N. Y. 152.

<sup>6</sup> Bradstreet v. Bank of Royalton, 43 Vt. 128. And see *Re Bonelli's Telegraph Co., L.*

*R. 12 Eq. 246; Edgerly v. Emerson, 23 N. H. 560.*

<sup>7</sup> New England Fire Ins. Co. v. Schettler, 38 Ill. 166.

<sup>8</sup> Sanborn v. Firemen's Ins. Co., 16 Gray, 488.

<sup>9</sup> "I imagine the bonds intended are such writings as are customary and sufficient for the purpose among business men." Safford, J., in *McCullough v. Talladega Ins. Co.*, 46 Ala. 376. And see *Jones v. Trustees*, 46 Ala. 626; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 471.

## Corporations.

cashier.<sup>1</sup> An insurance company, on an agreement to insure, made by an agent, though the charter provided that "all policies of insurance made by the corporation shall be subscribed by the president, or, in case of his death or absence, by the vice-president, and countersigned and sealed by the secretary of the company."<sup>2</sup> In an English case, seven days' notice was required by the charter of a bank previous to the transfer of shares, and this was held to be dispensed with by the previous usage and practice of the bank.<sup>3</sup> So, where the deed of settlement of a banking company allowed shares to be transferred upon obtaining the "consent of the board of directors," which was to be evidenced by a "certificate in writing, signed by three of the directors," and the practice of the bank had been for the managing director to receive the applications and sign a certificate of consent, which was afterwards signed by two of the directors, it was held that such transfers were valid.<sup>4</sup> Where the consent of the directors was required to a transfer of stock by a stockholder indebted to the company, but in the practice of the company such cases were never brought before the board, a transfer made without such consent, but according to the usage of the company, was considered good.<sup>5</sup> "It is insisted," said the court in one case, "that a majority of the directors could not bind the corporation. But we cannot regard the presence and concurrence of all essential to the validity of their acts. It would be nearly impracticable for them to fulfill the objects of their appointment under such a restriction. It would so clog and retard their operations in the business with which they may be daily and hourly charged as to defeat the beneficial exercise of their powers. So universal is the usage for a majority of the directors of banks, insurance companies, and other corporations of this description to act for the whole, that a power to do so may by general consent be understood to be implied by their appointment."<sup>6</sup>

§ 106. **Lien of Corporation on Shares of Stockholder.** — At common law, no lien exists in favor of a corporation upon the shares of a stockholder who is indebted to it.<sup>7</sup> The charter, articles of association, or by-laws may create such a lien, and the shareholder be bound thereby,<sup>8</sup> except in the case of national

<sup>1</sup> "In the judgment of the court, the clause of the charter does not apply to such contracts or engagements as occur in, or are necessary to the ordinary business of a cashier or agent, such as drawing or indorsing bills of exchange, checks, and drafts. These acts appertain, according to commercial law and usage, to the office of a cashier." *Nisbet, J., in Merchants' Bank v. Central Bank*, 1 Ga. 418; *Preston v. Missouri, etc., Lead Co.*, 51 Mo. 45.

<sup>2</sup> *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276.

<sup>3</sup> *Re Royal British Bank, Ex parte Walton*, 28 L. J. (Ch.) 542.

<sup>4</sup> *Bargate v. Shortridge*, 5 H. L. Cas. 297.

<sup>5</sup> *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Cram v. Bangor House Proprietary*, 12 Me. 354; *Keyser v. School District*, 35 N. W. 483.

<sup>6</sup> *Cram v. Bangor House Proprietary*, 12 Me. 354.

<sup>7</sup> *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; *Heart v. State Bank*, 2 Dev. Eq. 111; *Dana v. Brown*, 1 J. J. Marsh. 304; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280; *The People v. Crockett*, 9 Cal. 112; *Driscoll v. West Bradley, etc., Co.*, 59 N. Y. 96.

<sup>8</sup> *Brent v. Bank of Washington*, 10 Pet. 506; *German Savings Bank v. Jefferson*, 10 Bush. 326; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Arnold v. Suffolk Bank*, 27 Barb. 424; *McDowell v. Bank*, 1 Harr. (Del.) 27; *Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Vausands v. Middlesex Bank*, 26 Conn. 144; *Driscoll v. West Bradley, etc., R. Co.*, 59 N. Y. 96; *Child v. Hudson Bay Co.*, 2 P. Wms. 207.

## Lien on Stock.

banks organized under the act of 1864, which institutions, being expressly denied the power of loaning money to stockholders on the security of their stock, cannot in consequence be clothed with a right so inconsistent.<sup>1</sup> To what extent a usage may take the place of a by-law, or a distinct and official regulation in creating such a lien, was considered in an early Pennsylvania case, and a decision arrived at giving to a usage an effect certainly as great as necessary. The case was an action by Morgan and Smith, the assignees of one Wain, against the Bank of North America, for refusing to permit his stock to be transferred to them. The bank answered that it held the shares as a set-off against a debt of Wain's due to it. It appeared that there was no by-law or written regulation of the bank concerning the transfer of stock and giving a lien, but it was given in evidence that it was the unvaried course of dealing there, always insisted on, that no stockholder should transfer his stock while in debt to the bank; that the debt should be paid before the bank would suffer a transfer; and this usage was well known to Wain. The court, while admitting that a party entitled to a transfer of stock might maintain an action against those whose duty it was to make the transfer,<sup>2</sup> ruled that the custom was nevertheless a bar. "A course of dealing," it said, "a usage, an understanding, a contract, express or implied, is a lien of the parties and a law to them, provided they are not repugnant to the charter or the laws of the land. This is contrary to neither. If the restrictive clause had been inserted in the act of incorporation, as it is in the charters of the Philadelphia Bank, Farmers and Mechanics' Bank, and Union Bank of Georgetown, then, according to the decision of the Supreme Court of the United States in *Union Bank v. Laird*, 'no person could acquire a real right to any share except under a legal transfer according to the rules of the bank under the act of incorporation, of which he is bound to take notice.' The understood notice to Mr. Wain, and his continuing to deal with the bank with full knowledge of this term and condition, is equally binding on him and the present plaintiffs as if it were a written regulation, a by-law, a provision in the charter, or clause inserted in the very certificate of stock. The bank had an undoubted right to say to any stockholder, 'We discount your note, but remember, until it is paid we shall hold your stock in security; you shall not be permitted to transfer it until you pay us.' There is nothing unfair in this. The terms are known, and are accepted as between the parties to the present agreement — the stockholder and the bank. This amounts to an hypothecation — a pledge of stock. How it would have been in a controversy between a *bona fide* purchaser for valuable consideration and without notice, who pays his money to the stockholder on the faith of the certificate, intrusted with the symbol of the property, the constructive legal possession, the title-deed, on its face an instrument transferable and assignable, I do not give any opinion. It is a very different question. But, as between these parties, call this answer of the bank what you please, — set-off, legal or equitable, pledge, retainer, stoppage, course of dealing, general understanding, usage, contract, express or implied, — it is a bar in law and equity to

<sup>1</sup> *Rosenback v. Salt Springs National Bank*, 53 Barb. 495; *First National Bank v. Lanier*, 11 Wall. 369; *Bullard v. National Bank*, 18 Wa. 589; *Evansville National Bank v. Met-*

*ropolitan Bank*, 2 Biss. 527; *Lockwood v. Mechanics' National Bank*, 9 R. I. 308.

<sup>2</sup> *The King v. Bank of England*, Doug. 526; *Union Bank v. Laird*, 2 Wheat. 390; *Winsmore v. Greenbank*, Willes, 531.

## Insurance.

this action." Mr. PROFFATT, in his valuable notes to this case in the *American Decisions*,<sup>1</sup> says that the point decided in *Morgan v. Bank of North America* has not been passed upon in any subsequent decision, but the soundness of the doctrine is not disputed.

§ 107. **Transfer of Stock — Notice.** — Proof of usage to transfer certificates of stock by a blank indorsement, which may be filled up by the holder by writing an assignment and a power of attorney over the signature indorsed, is admissible;<sup>2</sup> and notices to stockholders published in newspapers, instead of given personally, are good by virtue of usage.<sup>3</sup>

## IV. INSURANCE.

§ 108. **Usages in the Law of Insurance.** — It was said by Mr. Justice BULLER, in an early case, that, "in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy which are not expressed in words. Usage not only explains, but even controls the policy."<sup>4</sup> Mr. MAY<sup>5</sup> objects to this statement, so far as it implies that contracts of insurance are subject to different rules of construction to those applicable to other contracts; but while his position is undoubtedly the correct one, it is nevertheless true that some modern courts have followed the opinion of Mr. Justice BULLER, and have in many cases treated the contract of insurance as one particularly to be considered and construed by the usages and customs of the mercantile world. Thus, in the leading case of *Walsh v. Homer*,<sup>6</sup> it is said: "The construction of contracts of insurance is peculiarly influenced by usage." In a recent case in Maryland, where an attempt was made for the first time to render liable for general average on a cargo damaged in endeavoring to extinguish a fire on a boat, certain companies which had issued fire-policies on the boat alone, the Court of Appeals said: "Now, it is well known that fire-policies have been in existence for centuries, and cases like the present, where the vessel has been insured by such policies, and the cargo insured under marine policies, must have frequently occurred; and yet no case has been found in which it has been held that the fire-policy must contribute to the loss sustained by the cargo. Not only this, but the proof in the record shows that the usage and laws recognized by mercantile men, and by which such policies are construed, are all against this contention. In determining for the first time a question arising upon insurance, such usage and laws are entitled to weight, not only because they are approved and sanctioned by practical and sagacious men in regard to a subject-matter in which they are alike interested, but also because the parties must be presumed to have contracted with reference to them. The whole law of insurance, it has been said, has done little else than to adapt such laws and usages, and to give to them the force of authority."<sup>7</sup>

Mr. ARNOULD, in his work on *Marine Insurance*,<sup>8</sup> notices this tendency of the

<sup>1</sup> 11 Am. Dec. 592.

<sup>2</sup> *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91. And see *s. c.* 20 Wend. 91; *Commercial Bank v. Kortright*, 22 Wend. 348.

<sup>3</sup> *Hall v. United States Ins. Co.*, 5 Gill, 484.

<sup>4</sup> *Long v. Allen*, Park. 390.

<sup>5</sup> *May on Ins.*, § 173.

<sup>6</sup> 10 Mo. 6, *ante*, p. 160.

<sup>7</sup> *Merchants', etc., Transp. Co. v. Associated Firemen's Ins. Co.*, 11 Cent. L. J. 323.

<sup>8</sup> Chap. 3.

## Usages of Underwriters.

courts: "A notion," he says, "appears at one time to have prevailed that policies of insurance formed an exception to the rules of construction generally applicable to all mercantile contracts, and were to be construed solely with the view of carrying out the intention of the parties, irrespective of the terms in which they had expressed their intentions on the face of their contract. This notion most probably arose from the extreme ambiguity of the terms employed in the common forms of policy, which required a constant reference to usage in order to explain them. Where so many clauses were doubtful, it seems to have been considered that none could be clear; and a rule of construction only applicable to those portions of the policy which would be intelligible without reference to usage was extended to those the meaning of which was too clear to admit of a doubt. It was also hardly sufficiently borne in mind that the rules of construction which might be fairly applied to the common printed clauses of the policy, which were not the immediate terms selected by the parties themselves for the expression of their meaning, were less appropriate for the interpretation of those written clauses and stipulations in which the parties may reasonably be considered to have employed the language best adapted for the explanation of the objects they had in view. The notion thus alluded to is now regarded as erroneous; and the true rule of construction is, that if the clauses of the policy are in themselves clear and unambiguous, the courts cannot admit parol evidence to contradict, to vary, or to explain them. If, on the contrary, they are obscure and ambiguous, the courts may resort to any means of explaining them, which may be supplied either by the rules of the common law, the general usages of trade, or the particular circumstances of the case." And though these expressions are frequent in the reports, they will be found, on examination, to have arisen from succeeding judges having copied the language of their predecessors without having examined their reasons. The criticisms of the text-writers upon these *dicta* are right. There is nothing in the contract of insurance to call for different rules than those applied to the construction of other contracts. The correct rule is to be found stated in several cases, both old and recent. In a New York decision it is thus summed up by SANDFORD, J.: "In fine, we believe that the rule of construction applicable to policies of insurance does not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification, unless such terms have, by the known usage of trade in respect to the subject-matter, acquired a meaning distinct from the popular sense of the same terms, or unless the instrument itself, taken together, shows that they were understood in some peculiar manner, and that while we may not enlarge or restrict the clear and explicit language of the contract by proof of a custom or usage, yet in the application of the contract to its subject-matter, in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within and what were excluded from its operation. Such evidence is proper, on the same principle that proof of the meaning of technical words, and words of science and the arts, is permitted in arriving at the intention of the parties in the construction of contracts." <sup>1</sup> In *Robertson v French*,<sup>2</sup> decided in 1803, Lord ELLEN-

<sup>1</sup> *Hone v. Mutual Safety Ins. Co.*, 1 Sandf.

<sup>2</sup> 4 East, 135.



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Marine Insurance.

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BOROUGH said: "In the course of the argument, it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments, and in all other cases; it is, therefore, proper to state upon this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of assurance, viz.: that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, — as, by the known usage of trade, or the like, — acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense."

§ 109. **Mr. Arnould's Four Rules.** — Mr. ARNOULD<sup>1</sup> gives four rules as to the admissibility of evidence of custom and usage in the interpretation of marine policies, which later authors<sup>2</sup> have approved as being equally applicable to all other kinds of insurance. They are: —

1. Every usage of a particular trade which is so well settled or so generally known that all persons engaged in that trade may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference.

2. The usage, in order to be binding, must be either a general usage of the whole mercantile world, or a particular usage of universal notoriety in the trade upon which and of the place at which the insurance is effected. The usage of a particular place or of a particular class of persons cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it.

3. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in a given case.

4. A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal. Such evidence will never be admitted to set aside or control its plain and unambiguous terms.

§ 110. **Every general Usage prima facie Part of the Policy — Marine Insurance.** — In the law of marine insurance, it may be stated as a well-established rule that every usage of a particular trade which is so well settled or so generally known that all persons engaged in it may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms or the policy decisively repel the infer-

<sup>1</sup> Arnould on Ins. 63.

<sup>2</sup> May, Angell, and others.



## Usages Incorporated into Policies.

ence.<sup>1</sup> Every underwriter, said Lord MANSFIELD in an early case,<sup>2</sup> is presumed to be acquainted with the practice of the trade he insures. "The principle upon which evidence of usage is received at all to explain a policy," says Mr. ARNOULD,<sup>3</sup> "is that the parties to it are supposed to have contracted with reference to such usage. With regard to usages which are either common to all trades, or perfectly well known and settled in the particular course of trade to which the insurance relates, it is obviously a fair presumption that the parties to the policy, as mercantile men, are conversant with such usages and have contracted with reference to them. Such usages, in fact, form part of the law-merchant, and to incorporate them with the policy is merely to admit the addition of known terms not inconsistent with the tenor of the instrument, and well understood by the contracting parties; but with regard to usages which only prevail in a given place, or amongst a particular description of persons, the presumption is the other way, and in such cases, accordingly, it must be satisfactorily shown that the party sought to be affected by the usage either had or might have had cognizance of it." This principle Mr. ARNOULD illustrates in his *Law of Marine Insurance* by several cases which have been decided as to the admissibility and effect of evidence of the usage at Lloyd's, and which will be found below.<sup>4</sup>

<sup>1</sup> Arnould on Ins. 65 (approved by May<sup>1</sup> Angell, and others); *Hancox v. Fishing Ins. Co.*, 2 Sumn. 132; *Union Bank v. Union Ins. Co.*, Dudley (S. C.), 171; *Hartshorne v. Union Ins. Co.*, 5 Bosw. 536; 36 N. Y. 172; *Gray v. Swan*, 1 Har. & J. 142; *Murray v. Hatch*, 6 Mass. 477; *Stanton v. Natchez Ins. Co.*, 5 How. 744; *Black v. California Ins. Co.*, 42 N. Y. 393; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151; *Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129; *Pittsburg Ins. Co. v. Dravo*, 2 W. N. C. 194.

<sup>2</sup> *Noble v. Kennoway*, 2 Doug. 510.

<sup>3</sup> Arnould on Ins., § 43.

<sup>4</sup> "As the great majority of insurance business in England," says Mr. Arnould (1 Ins., p. 73), "is still carried on by the private underwriters who meet at Lloyd's, it might have been considered no very violent presumption that all parties resident in this country employing brokers to effect policies for them, in the common course of business, should be considered to have done so with reference to the usages established at Lloyd's, especially where such policies have been actually effected for them at that house. Such, however, has not been the result of the decisions; but it has been held, especially by Lord Tenterden, that although clear proof may be given of a particular usage being established at Lloyd's, and even though the fact may be that the policy was effected by a broker at Lloyd's, in the common course of business, for a party resident

in this country, yet that such party cannot be affected by the usage unless it can be further shown, either that he was actually cognizant of it, or from his general modes of dealing, habits of life, or place of business, cannot be supposed to have been ignorant of it. *Gabay v. Lloyd*, 3 Barn. & Cress. 793; *Bartlett v. Pentland*, 10 Barn. & Cress. 760; *Scott v. Irving*, 1 Barn. & Adol. 605; *Stewart v. Aberdeen*, 4 Mee. & W. 211. A Liverpool house, through the agency of a London broker, effected a policy at Lloyd's on horses 'warranted free of jettison and mortality,' from Liverpool to Jamaica. In the course of the voyage a violent storm came on, during which the horses broke down the partitions that separated them, and three of them were kicked to death. The underwriter refused to make good this loss, on the ground that on policies containing this warranty it was contrary to the usage of Lloyd's to pay any loss for mortality on live stock occurring in the course of the voyage, except where the ship was lost before arrival. The facts of the case were stated in the form of a special verdict, which set out the custom at Lloyd's, as proved at the trial, but did not contain any finding that the plaintiff was cognizant of such usage. The court, under these circumstances, held that the plaintiff was not bound by the usage; it was not found to be a general usage of the whole trade in the city of London, and, therefore, in order to render it binding on the plaintiff, it ought to have been distinctly

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§ 111. **Commencement and End of Risk.** — It is a rule of law that a risk on a ship, or on goods therein, commences only at the very port or place named in the policy as that from which the ship is to sail, or where the goods are to be loaded, and ends only when the ship has reached the port to which it is insured. But, — as has been seen where the liability of the carrier for the receipt and delivery of goods has been called in question,<sup>1</sup> — if a general usage can be shown that the ship is to sail, or the goods be taken, or the ship land, or the goods be discharged at *another* place than that named in the policy, the underwriter or the insurer will be bound by such a usage, and will not be allowed to dispute his liability, or set up a right on the ground of the conditions in the policy. *Kingston v. Krubbs*,<sup>2</sup> decided by the King's Bench in 1808, was an action on a policy on a ship at and from Oporto to London. The ship having taken in a part of her cargo within the bar of Oporto, went outside to take in the remainder, when she was

found that he was cognizant of it. *Gabay v. Lloyd*, 3 Barn. & Cress. 793. Had the evidence at the trial shown that the plaintiff was in the habit of effecting policies at Lloyd's, that, the court said, would have warranted the special verdict in finding that he had knowledge of the usage in question. By the general usage of the law mercantile, the insurance-broker is considered as debtor to the underwriter for the premiums, while the underwriter is debtor to the assured for the loss. *Per* Lord Tenterden, in *Bartlett v. Pentland*, 10 Barn. & Cress. 780. A custom, however, has long prevailed at Lloyd's, and is well known to all who transact business there, that the insurance-brokers settle with the underwriters according to the state of their accounts with them, in which accounts the broker is made the debtor to the underwriter for all premiums on any policies effected by him with such underwriter, no matter on whose account; and the underwriter, in the same way, is made debtor to the broker for all losses, as between the underwriter and the broker. Such settlement on account is considered as payment, according to the custom at Lloyd's; whether it is also to be considered as between the underwriter and the assured, depends upon the question whether the assured can fairly be presumed, from all the circumstances of the case, to have been cognizant of the usage. If he be himself resident in London, or has for a considerable length of time been in the habit of employing insurance-brokers to effect policies for him at Lloyd's, then the reasonable presumption is that he was aware of the usage, and will be bound by it. If, on the other hand, he was not resident in London, and cannot be shown to have been for any length of time in the habit of effecting insurances at Lloyd's, the rea-

sonable presumption will be the other way, and he will not be bound by the usage. See the cases of *Bartlett v. Pentland*, 10 Barn. & Cress. 780; *Scott v. Irving*, 1 Barn. & Adol. 605; *Stewart v. Aberdein*, 4 Mee. & W. 211. So strong, however, has the binding force of a usage at Lloyd's been considered with regard to all those in the habit of transacting business there, that in one case it was even admitted to prove a mode of adjustment inconsistent with the true principles of marine insurance as a contract for indemnity. Thus, where, in an open policy on freight, the assured contended that he was entitled, in case of a total loss, to recover the amount of the gross freight without any reduction, and to establish this right called witnesses of thirty or forty years' experience at Lloyd's, who stated that, though open policies on freight were rare, yet the uniform custom of settling losses upon them had been to pay the assured the amount of the gross freight. Defendant also called witnesses nearly equal in number and experience, who stated that they were not aware of the existence of the usage, as sworn to by plaintiff's witnesses. See report, p. 62. The court admitted the evidence, although the allowed that the practice seemed inconsistent with the true principles of indemnity. *Palmer v. Blackburn*, 1 Bing. 61. In this case Chief Justice Dallas doubted, but Park, J., and Burroughs, J., the other two members of the court then present, were clear that the evidence had been rightly admitted. It is not stated in the case, but may be fairly inferred from it, that the policy was effected with a party well conversant with the general course of business at Lloyd's.

<sup>1</sup> *Ante*, § 79.

<sup>2</sup> 1 Camp. 598.

## Deviation.

driven out to sea in a gale of wind, and captured. The defence was that the underwriters had not been informed that she was to take in any part of her cargo outside the bar. Several witnesses testified on the trial that it was customary to do so at Oporto when, from the state of the river, they could not conveniently load inside the bar. Lord ELLENBOROUGH ruled that the underwriters were bound, of themselves, to take notice of the usage, and the plaintiff had a verdict. In *Moxon v. Atkins*,<sup>1</sup> the policy read, "at and from the ship's loading port or ports in Amelia Island to London." There was no port on that island, and ships never touched there; but the vessel in question took in her cargo at Tigre Island, which lies a little farther up the river St. Mary's. The plaintiff had a verdict, Lord ELLENBOROUGH saying: "The words of the policy cannot be literally understood, for there is no port in Amelia Island where the ship could load. The real question is, whether there has been a loading at Amelia Island within the meaning of the parties when the policy was effected. Strictly and locally, there has been no loading at Amelia Island. But it is possible that in mercantile contracts Amelia Island may denominate a region in which Tigre Island is comprehended. Essequibo has been held for some purposes to be part of Demerara, although the two settlements are quite distinct. There is the more familiar instance of Westminster being considered in London, the general name for the metropolis, yet we know that in strictness London only comprehends the limits of the city. The circumstance of the ship paying duties and clearing at Amelia Island may go a great way to show that ships which do so are conceived to have loaded there. The question here will be whether, upon the evidence, this cargo can be said to have been loaded at Amelia Island according to the usages of such voyages. If it was, the policy attached, although, literally speaking, no part of the cargo had ever been upon Amelia Island."

So as to arrival and delivery. It was formerly the custom at Archangel, immediately on a ship's arrival, to seal down her hatches, send a custom-house officer on board till she was unloaded, and carry the goods to the government warehouses, where they remained till the duty was paid. A merchant who had insured his goods from London to Archangel, "until they should be there discharged and safely landed," was held to have no right of action against the underwriter for any loss that had occurred to the goods after the hatches had been sealed down and the revenue officer put on board; for, as Lord ELLENBOROUGH said, the goods were there landed according to the usual course of trade at Archangel, which was all the underwriter undertook.<sup>2</sup> Likewise, in a case in the Supreme Court of the United States, where a custom was proved prevailing in the port of Leghorn, that goods shipped for that port should be invariably landed at the Lazaretto, it was held that one who had insured certain goods "till they were safely landed at Leghorn" could not protect them by such policy after they were once landed at the Lazaretto, such being, by the custom of the trade, equivalent to a landing at Leghorn.<sup>3</sup>

§ 112. Deviation. — The doctrine of deviation is one of considerable importance in the law of marine insurance. Shortly stated, and as established by the adjudications, it is this: That the meaning of the parties to the policy is un-

<sup>1</sup> 3 Camp. 200.

<sup>2</sup> *Gracie v. Maryland Ins. Co.*, 8 Cranch, 75.

<sup>3</sup> *Brown v. Carstairs*, 3 Camp. 160.

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versally understood to be that the ship shall proceed from one terminus of the voyage insured to the other in a direct course, without touching at any intermediate point or pursuing any intermediate adventure. Therefore, if she do so, without leave for that purpose being expressly given in the policy, this, however trifling in extent or duration, is a *deviation*, although the ship may afterwards return to her proper course; and this will discharge the underwriter.<sup>1</sup> But the usage of the trade may change this rule, provided it be clearly established and general in its operation, and may justify a ship in quitting the direct line between the port of departure and the port of destination.<sup>2</sup> Thus, it being usual for ships sailing through the Sound to stop at a certain point to pay the Sound dues,<sup>3</sup> and it being the usage of the trade to take in an additional cargo at the place into which a ship might be driven by stress of weather,<sup>4</sup> these stoppages did not discharge the underwriters. On the same principle, in the East India and Newfoundland trades, it has been ruled in many cases to be no deviation to engage in intermediate voyages, because of a usage which every underwriter insuring in those trades was bound to know. Such intermediate voyages were understood to be included in the course of the voyages insured.<sup>5</sup> Reference is also proper here to the cases which establish that a ship may visit the ports on the voyage in the order which usage and custom has established,<sup>6</sup> although the rule of law is that *the ship must visit such ports in the geographical order of their distance from the terminus or port of departure*.<sup>7</sup> A deviation simply for the purpose of saving property will discharge the insurer;<sup>8</sup> but not so if a custom of the river permits it.<sup>9</sup>

"Where, however," it is said by Mr. ARNOULD, "the policy itself, besides indicating the termini of the voyage, contains any direction as to the course which the ship shall take in sailing between them, such directions must be followed with the most scrupulous and literal exactness, and the slightest failure to comply with them will amount to a fatal deviation." This is but another instance of the oft-repeated rule that a usage will not be heard to contradict the words of an express contract.<sup>10</sup> *Elliot v. Wilson*<sup>11</sup> is a leading case upon this point. It was usual for vessels sailing from Carron with goods or freight for Hull, in going down the Frith of Forth, to touch at different places for the purpose of taking in and delivering goods, particularly at Borrowstoness, Leith, and Morrison's Haven. A merchant who was desirous of insuring goods on a voyage from Carron to Hull directed his broker to effect an insurance, with liberty in the policy "to call as usual" (which would have enabled the ship to

<sup>1</sup> 3 Kent's Comm. 312; Arnould on Ins. 554; Fox v. Black, Park, 620; Townson v. Guyon, Park, 620; Clason v. Simmonds, 6 Term Rep. 533.

<sup>2</sup> See *Crosby v. Fitch*, 12 Conn. 240; *Babcock v. May*, 4 Ohio, 334; *Lowry v. Russell*, 8 Pick. 360; *McCall v. Sun Mutual Ins. Co.*, 66 N. Y. 505; *Eyre v. Marine Ins. Co.*, 5 Watts & S. 116; *Wright v. Holcombe*, 6 Upper Canada C. P. 531.

<sup>3</sup> *Cormack v. Gladstone*, 11 East, 347.

<sup>4</sup> *Delaney v. Stoddart*, 1 Term Rep. 22.

<sup>5</sup> *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Doug. 419; *Farquharson*

*v. Hunter*, Park, 105; *Vallance v. Dewar*, 1 Camp. 508; *Ougier v. Jennings*, 1 Camp. 503.

<sup>6</sup> *Beatson v. Haworth*, 6 Term Rep. 531; *Gairdner v. Senhouse*, 3 Taun. 16.

<sup>7</sup> *Clason v. Simmonds*, 6 Term Rep. 533; *Andrews v. Mellish*, 5 Taun. 502; *Marsden v. Reid*, 3 East, 577; *Kane v. Colonial Ins. Co.*, 2 Johns. 264; *Deblois v. Ocean Ins. Co.*, 16 Pick. 303; *Mellish v. Andrews*, 2 Mau. & Sel. 28.

<sup>8</sup> *Scaramanga v. Stamp*, 28 Week. Rep. 601.

<sup>9</sup> *Walsh v. Homer*, 10 Mo. 16; *ante*, p. 160.

<sup>10</sup> *Post*, Chap. V.

<sup>11</sup> 4 Bro. P. C. 470.

## General Average.

touch at all or any of the three places above mentioned). Instead of this, the broker, contrary to the directions of the merchant, and without his knowledge, insured the goods on the voyage from "Carron to Hull, with liberty to stop at Leith." The premium was the same as usual. The ship sailed on her voyage, passed by Leith without calling there, but put into Morrison's Haven. She sustained no damage there, but was afterwards overtaken by a storm and wrecked on the coast of Newfoundland. The Scotch court decreed against the underwriters, but the House of Lords reversed their judgment, on the ground that putting into Morrison's Haven under a policy which contained no liberty to do so, but, on the contrary, gave express permission to put into another named port, was a deviation discharging the underwriters from all further liability.

§ 113. **General Average.**—The doctrine of general average may thus be stated: "*If goods are necessarily thrown overboard for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all.*" The doctrine is founded in pure equity. The sacrifice being made for the safety of the vessel and remaining cargo, the owner of the goods should bear no more than his just proportion of the loss thus incurred. From the benefit of this right to contribution the owner of goods loaded above deck was excluded, on the ground that such loading is improper, tending to embarrass the movements of the crew and the working of the ship. To the universal application of the rule (excluding deck cargo) serious objection has been made from the outset, and strenuous efforts used to limit its operation. It has been urged that some goods may be placed on deck without embarrassing the crew or the movements of the vessel, and especially in short voyages from port to port: that custom has established the safety of such loading, in some kinds of cargo, and in voyages between certain places; and that where such loading is in pursuance of *contract* with the carrier, he cannot urge the objection that it is improper. From the beginning, most, if not all elementary writers on the subject have stated the rule with exceptions. Valin says: "The doctrine excluding goods carried on deck (and jettisoned) from general average ought to be controlled by the *usages of trade*; and, accordingly, contribution may be claimed for goods thrown overboard from the decks of small coasting-vessels, or river craft, which usually carry part of their cargo on deck."<sup>1</sup> The only exception which seems well supported, of an early date, is one in favor of goods carried on deck in pursuance of *custom*. What is said in the early cases and elementary works respecting goods so carried on small coasting-vessels must be referred to custom, and is true only to the extent that such custom is shown to exist. As the reason for exclusion is the unsafe and improper loading, it might be supposed that the rule would not apply in any case where it could be shown by testimony that, from the character of the cargo or the voyage, the loading is safe and proper. A careful examination of the authorities, however, will show that this question of safety is referred to the judgment of the trade, as expressed in its customs, and cannot be inquired of in any other way.<sup>2</sup>

<sup>1</sup> Valin's *Orl. de la Mer*, art. 13.

<sup>2</sup> *Wood v. Phoenix Ins. Co.*, 37 Leg. Int. 148; *Miller v. Tetherington*, 6 Hurl. & N. 278.

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§ 114. **Extent of the Policy.**— It had been settled by several cases that in a policy of marine insurance effected upon certain goods on an outward voyage and their "proceeds" home, the word "proceeds" meant the same as "produce," viz.: something proceeding from, or produced by something else—the same amount or value of goods sold and converted into money, or goods purchased with such money, or exchanged for the original goods.<sup>1</sup> Such a construction was therefore inconsistent with the idea that the term should include the identical goods brought home on the return voyage. When, therefore, in *Dono v. Whetten*,<sup>2</sup> decided by the Supreme Court of New York in 1831, this precise question arose, the court ruled that where goods are shipped for a voyage, and a policy is effected upon the goods out and upon the "proceeds" thereof home, the identical goods composing the outward cargo, brought home on the return voyage, would not be considered as included in the word "proceeds," nor covered by the policy; and that a usage to the contrary was not material. But in the Court of Errors this ruling was reversed. "If the plaintiff," said Chancellor WALWORTH, "could have shown a settled usage among commercial men to consider the same specific articles, when brought back upon the return voyage, to be the proceeds of the outward cargo, and to be included in that term, he should have been permitted to give such evidence to the jury."

§ 115. **Apportionment of Premium — Adjustment.**— And the general rule of law that *there can be no apportionment of the premium where the risk is entire*, may be entirely changed by an established usage to apportion the premium in certain cases.<sup>3</sup> But in *Homer v. Dorr*,<sup>4</sup> where the insurance was on property laden on freight from Boston to Archangel, and back to Boston, taking the risk on shore as well as on board, in an action on the premium-note, it was held that the whole note was recoverable, though no property was returned in the ship, although it was proved to be the universal usage in Boston, where the insurance was effected, to return a portion of the premium in such cases. This case was subsequently followed, in *Eager v. Atlas Insurance Company*,<sup>5</sup> by the same court, which decided that the rule of law that in adjusting a partial loss on a ship which has been repaired, the proceeds of the old materials not used in the repairs are first to be deducted from the gross expenses of the repairs, and then the deduction of one-third new for old to be made from the balance, could not be altered by a usage to make the deduction from the gross amount of the expenses of repairs. "The usage," said WILDE, J., "is opposed to the essence of the contract of insurance, which is a contract of indemnity. The usage is also opposed to the rule of law, as we understand it, by which partial losses, when vessels are to be repaired, are to be adjusted." On the other hand, in Alabama, a custom in the city of Mobile, as to the mode of adjusting damages in cases of partial loss on valued policies, to pay the difference between the sales price of the injured article and the price stipulated in the policy, was held valid and binding on parties residing and contracting in that city. It was argued that the

<sup>1</sup> *Haven v. Gray*, 12 Mass. 76; *Whitney American Ins. Co.*, 3 Cow. 210.

<sup>2</sup> 8 Wend. 169.

<sup>3</sup> *Rothwell v. Cook*, 1 Bos. & P. 172; *Lewis v. Thatcher*, 15 Mass. 438; *Stevenson v.*

now, 3 Burr. 1237. *Contra*, *Homer v. Dorr*, 10 Mass. 26.

<sup>4</sup> 10 Mass. 26.

<sup>5</sup> 14 Pick. 141.



## Usages in Different Cases.

rule in such cases, to find a per centum of loss by calculation based on the true value of the uninjured and of the injured goods, and to apply this to the sum insured on the policy, was well settled, and the text-books and reports were cited to sustain this contention.<sup>1</sup> But the court said: "The general law regulating the assessment of damages under such policies, even if it differed from this custom, must give way to it."<sup>2</sup> Yet, again, in a recent Massachusetts case,<sup>3</sup> the rule of law that in estimating a loss under an open policy, the damages are to be based upon the market value of the goods at the inception of the risk,<sup>4</sup> it was held could not be affected by a custom, which the defendant offered to prove, that the invoice value, and not the market value at the time and place of shipment, was treated as the basis of insurable value. "This being the rule of law as to damage," said the court, "the custom of a particular port could not vary it."<sup>5</sup>

The commercial practice of adding the premiums to the invoice value may be modified and controlled by a local usage.<sup>6</sup>

§ 116. *Other Cases.*—So, in a marine insurance case, evidence of usage has been admitted to show when the outward-bound risk determined and the homeward-bound risk commenced;<sup>7</sup> to show the length of time allowed to shippers to discharge their cargo after the arrival of the vessel in port;<sup>8</sup> that the owner of goods stored on deck should not receive any contribution, by way of general average, from the ship-owner in respect of the jettison of goods so stowed;<sup>9</sup> that the underwriters on ships should not be liable to contribute, by way of general average, in respect to such goods;<sup>10</sup> that the destruction of rigging, while stored on the banks of the Canton River, was within the policy covering a "voyage;"<sup>11</sup> that a policy of insurance on East India ships includes the chance of their being detained in India, and the risk of what is known as the country trade there;<sup>12</sup> that a policy from London to Madras and China, with liberty to touch, stay, and trade at any ports, etc., until the vessel shall arrive at her last loading-place in the East Indies or China, covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China;<sup>13</sup> that ships engaged in the Newfoundland trade, after their arrival at Newfoundland, make intermediate voyages from one American port to another before beginning to load a cargo on the homeward voyage.<sup>14</sup> And a party may exempt himself from the consequences of the general law that the insured must provide a pilot,<sup>15</sup>

<sup>1</sup> 1 *Arnould on Ins.* 970, 974; 2 *Id.* 310; *Natchez Ins. Co. v. Buckner*, 4 How. 63.

<sup>2</sup> *Fulton Ins. Co. v. Milner*, 23 Ala. 490.

<sup>3</sup> *Warren v. Franklin Ins. Co.*, 104 Mass. 518.

<sup>4</sup> *Coffin v. Newburyport Ins. Co.*, 9 Mass. 436; *Le Roy v. United States Ins. Co.*, 7 Johns. 343; *Carson v. Marine Ins. Co.*, 2 Wash. C. Ct. 463; *Cox v. Charleston, etc., Ins. Co.*, 3 Rich. L. 331.

<sup>5</sup> And see as to usage and the settlement of average losses, *Sanderson v. Columbian Ins. Co.*, 2 Cranch C. Ct. 218; *Sturgis v. Cary*, 2 Curtis, 382.

<sup>6</sup> *Merchants' Mutual Ins. Co. v. Wilson*, 2 Md. 217.

<sup>7</sup> *Camden v. Cowley*, 1 W. Black. 417.

<sup>8</sup> *Noble v. Kennoway*, 2 Doug. 511.

<sup>9</sup> *Milward v. Hibbert*, 3 Q. B. 120.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Pelly v. Royal Ex. Assur.*, 1 Burr. 341.

<sup>12</sup> *Salvador v. Hopkins*, 3 Burr. 1707.

<sup>13</sup> *Gregory v. Christie*, 3 Doug. 419.

<sup>14</sup> *Vallance v. Dewar*, 1 Camp. 403; *Ougier v. Jennings*, 1 Camp. 503, note.

<sup>15</sup> *Hollingsworth v. Broderick*, 7 Ad. & E. 44; *Law v. Hollingsworth*, 7 Term Rep. 160; *Phillips v. Headlam*, 2 Barn. & Adol. 380; *Sadler v. Dixon*, 8 Mee. & W. 900.



## Fire Insurance.

by showing that by the usage of the port he was exempted from providing one.<sup>1</sup> And although, in the law of marine insurance, a concealment of papers amounts to a breach of warranty, it was held in an early case in the Supreme Court of the United States, that "when the underwriters know, or by the usage and course of the trade insured ought to know, that certain papers ought to be on board for the purpose of protection in one event, which in another might endanger the property, they tacitly consent that the papers shall be so used as to protect the property."<sup>2</sup> So, evidence of usage is competent where the question is whether the risk has been increased by taking on board a deck-load of cotton.<sup>3</sup>

§ 117. Every general Usage prima facie part of the Policy—Fire Insurance.—What has been said in the former section as to the effect of usage on contracts of marine insurance is equally applicable to contracts of fire insurance. The parties are presumed to make their agreements in accordance with the customs of their business.<sup>4</sup> And the general rule that one engaged in a particular business is presumed to contract with reference to the well-known usages of that particular business, may, perhaps, be extended beyond this statement, for it must include the incidents of that business. Thus, a fire-insurance company, for example, insuring a manufacturing establishment must be presumed to be familiar with the use of terms employed in that trade.<sup>5</sup>

§ 118. Customary Incidents of the Business insured.—The leading case of *Harper v. City Insurance Company*<sup>6</sup> lays down this general rule, which numerous authorities support, viz.: That where a certain trade, or business, or occupation is insured, the insurer is to be taken as consenting and agreeing that all its customary incidents shall be allowed, though the policy does not in express words permit it, and may even by implication forbid it. In Harper's case, the insurance being upon a printing and book-binding establishment, and the use of camphene being necessary and customary for the conduct of the business, the insurer was held liable for a loss caused by the ignition of camphene, and this although there was a condition in the policy exempting the insurer from any loss occasioned by camphene. By insuring the plaintiff's stock with the privilege of a printing-office and a book-bindery, it was well said by the court, the use of such materials, including camphene, as were necessary in that business was allowed; otherwise the contract was a mere delusion.<sup>7</sup> Following the principle of this case, where a policy on a fair-building insured property therein "belonging to exhibitors," it was held that the use of fire and steam to exhibit machinery, and the keeping of a restaurant, and a kitchen with ovens therein, did not defeat the insurance, and that the keeping of articles to be exhibited, or to be used as means of the exhibition, was not a use of the building "for the purpose of keeping or storing" them therein.<sup>8</sup> Where a policy was issued on a

<sup>1</sup> *Cox v. Charleston, etc., Ins. Co.*, 3 Rich. L. 331.

<sup>2</sup> *Livingston v. Maryland Ins. Co.*, 7 Oranch, 506.

<sup>3</sup> *Lapham v. Atlas Ins. Co.*, 24 Pick. 1.

<sup>4</sup> *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Standard Oil Co. v. Triumph Ins. Co.*, 3 Cent. L. J. 602.

<sup>5</sup> *Daniels v. Hudson River, etc., Ins. Co.*, 12 Cush. 416; *Sims v. State Ins. Co.*, 47 Mo. 54; *May v. Buckeye Ins. Co.*, 25 Wis. 291.

<sup>6</sup> *Ante*, p. 148.

<sup>7</sup> See also *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194.

<sup>8</sup> *Mayor v. Hamilton Fire Ins. Co.*, 10 Bosw. 537; *New York v. Exchange Ins. Co.*, 9 Bosw. 424.

## Incidents of Business Insured.

building occupied as a manufactory of hat-bodies, and the conditions, among occupations denominated "extra-hazardous," included "carpenters in their own shops, or in buildings erecting or repairing," the use of a room in the building as a shop for the purpose of repairing the machinery necessary for the business of making hat-bodies was protected by the policy.<sup>1</sup> Where the policy was on a stock of flour, grain, and cooperage contained in a stone and brick steam flouring-mill, and prohibited the building from being used for mechanical operations requiring heat, the use of a kiln-drying cornmeal-mill requiring fire did not avoid the policy, if such a mill was a usual appendage of the business of a steam flouring-mill.<sup>2</sup> Where a policy on the material of a photographer prohibited the keeping of kerosene in the building, if the use of a kerosene-oil stove was necessary and ordinary in the photographic business, the insured might use it, without avoiding the policy.<sup>3</sup> Where a policy covers "a stock of dry goods and groceries, such as are usually kept in country stores," the language gives a license to keep for sale any article usually kept in country stores of that class, even though it involves the keeping of many articles coming under the head of "hazardous."<sup>4</sup> But where a policy covers a stock of merchandise "hazardous and not hazardous," no such license can be imputed, even though it be shown that the keeping of "extra-hazardous goods" was usual in such stores as that of the insured;<sup>5</sup> nor where the term is restricted to a "stock of family groceries," even though the insurer knew that the plaintiff kept such goods, and the application called for insurance "upon a stock such as is usually kept in a country store."<sup>6</sup>

It being the custom of the grocery trade to keep oil and spirituous liquors in their stores for the purpose of ordinary retailing, this is not a "storing" within a policy of insurance on a grocery store prohibiting "the storing therein of oil and spirituous liquors;"<sup>7</sup> or, it being the custom of the dry-goods trade to keep cotton in bales for sale, such a keeping is not a violation of a condition against applying or using the store insured for storing articles of a hazardous character, cotton in bales being denominated in another part of the policy as an "article of a hazardous character."<sup>8</sup> It being usual for dealers in fancy goods and toys to keep fire-works, a policy on the stock of a fancy-goods dealer, "with privilege to keep fire-crackers for sale," will embrace "fire-works," even though the policy provides that if the premises shall be used for keeping articles "specially hazardous," it shall be of no effect; and in this class are placed "fire-works."<sup>9</sup> It being usual in china-factories to keep a carpenter constantly employed in and about the building making racks, shelves, etc., necessary for the proper conduct of the business, this will not be considered as within a provision in a policy as

<sup>1</sup> Lounsbury v. Protection Ins. Co., 8 Conn. 459.

<sup>2</sup> Washington, etc., Ins. Co. v. Mechanics', etc., Ins. Co., 5 Ohio St. 450.

<sup>3</sup> Hall v. Insurance Co. of North America, 58 N. Y. 292.

<sup>4</sup> Rafferty v. New Brunswick Ins. Co., 3 Harr. (N. J.) 480; Leggett v. Insurance Co., 10 Rich. L. 292; Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124; Girard Fire Ins. Co. v. Stephenson, 44 Pa. St. 298; Citizens' Ins. Co. v. McLaughlin, 54 Pa. St. 485; Archer v.

Merchants', etc., Ins. Co., 43 Mo. 434; Pindar v. King's County Ins. Co., 36 N. Y. 648.

<sup>5</sup> Pindar v. Continental Ins. Co., 38 N. Y. 364.

<sup>6</sup> People's Ins. Co. v. Kuhn, 1 Cent. L. J. 214; Pindar v. Resolute Ins. Co., 47 N. Y. 114.

<sup>7</sup> Langdon v. Equitable Ins. Co., 1 Hall, 227.

<sup>8</sup> Moore v. Protection Ins. Co., 29 Me. 97.

<sup>9</sup> Steinback v. Lafayette Ins. Co., 54 N. Y. 90.

## Fire Insurance.

to "carpenters in their own shops, or in buildings erecting or repairing."<sup>1</sup> It being customary in country stores to keep a couple of kegs of gunpowder for sale in small quantities, this will not avoid a policy on such a store, one of the conditions of which may be that "the keeping of gunpowder for sale, or on storage upon or in the premises insured, shall render the policy void."<sup>2</sup>

Benzine being used in the finishing of rustic window-shades, such a use in a "manufacturing establishment," insured as such, will not avoid the policy, though prohibited in terms therein;<sup>3</sup> nor, being used in a wagon-maker's shop, and being customarily used in the manufacture of wagons, will a fire arising from this fluid prevent a recovery on a policy which expressly provides that the company shall not be liable for damage resulting from "the use of camphine, spirit-gas, or burning-fluid."<sup>4</sup> Benzole being commonly used in the manufacture of patent leather, such a use is not a breach of a condition in a policy on a patent-leather manufactory which allowed the keeping of benzole in no other place than in a shed detached from the building, where the insured, in conducting their business, carried it, as needed, into the factory in an open can.<sup>5</sup> In the manufacture of brass clock-works, turpentine is used for cleaning the works, alcohol in making a mixture called licker, and saltpetre in making a dipping, and which are all employed in the business. A policy, therefore, on the stock in trade of a manufacturer of brass clocks is not avoided by using and keeping these articles on hand, although they are expressly prohibited therein.<sup>6</sup> A policy on the stock of a "rope manufacturer" will permit the business of a "rope-maker" in the building insured, though that trade is prohibited in another part of the policy.<sup>7</sup> A policy on railroad buildings will not be avoided by the customary use of a dummy-engine near the buildings, though such use increases the risk.<sup>8</sup> A policy on merchandise such as is usually kept in country stores is not avoided by keeping hardware, china, glass-ware, and looking-glasses, without particularly describing them, though such particular description is required by its terms.<sup>9</sup> A policy upon stock such as is usually kept in country stores covers spirits of turpentine and gunpowder, if usually a part of the stock of country stores, although these articles are in another part of the policy prohibited from being kept therein.<sup>10</sup> In *Pindar v. King's County Insurance Company*,<sup>11</sup> GROVER, J., of the New York Court of Appeals, discussing such a policy, said: "The description of the goods insured by the policy was such goods as are usually kept in country stores. To determine what particular

<sup>1</sup> *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall, 589.

<sup>2</sup> *Leggett v. Aetna Ins. Co.*, 10 Rich. L. 202; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492. But see *Macomber v. Howard Ins. Co.*, 7 Gray, 257; *Beacon Life, etc., Assur. Co. v. Gibb*, 1 Moo. P. C. C. (N. S.) 73.

<sup>3</sup> *Viele v. Germania Ins. Co.*, 26 Iowa, 10.

<sup>4</sup> *Archer v. Merchants', etc., Ins. Co.*, 43 Mo. 434.

<sup>5</sup> *Citizens' Ins. Co. v. McLaughlin*, 59 Pa. St. 485. "They," [the company] said the court to the jury, "must be supposed to know that it was carried on in the usual and customary way; and if it was usual and

customary to employ benzole in the manufacture of such leather, they must be presumed to have known the fact, and to have contracted with reference thereto."

<sup>6</sup> *Bryant v. Poughkeepsie Mutual Ins. Co.*, 17 N. Y. 200.

<sup>7</sup> *Wall v. Howard Ins. Co.*, 14 Barb. 383.

<sup>8</sup> *The Commonwealth v. Hide and Leather Ins. Co.*, 112 Mass. 136.

<sup>9</sup> *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350.

<sup>10</sup> *Pindar v. King's County Ins. Co.*, 36 N. Y. 648.

<sup>11</sup> 36 N. Y. 643.

## Increase of Risk.

goods were covered by the policy, it was necessary to ascertain what goods were usually kept in country stores. This rendered proof of what was so kept, necessary and competent. The objection to this evidence was therefore properly overruled. The evidence showed that spirits of turpentine and gunpowder were usually kept in country stores. These articles were thus brought within the description of the policy, and covered by it. It was wholly immaterial whether, when stocks of country stores were insured, it was usual to make some special agreement in relation to these articles. The inquiry was simply whether they were usually kept in country stores, not how they were insured when so kept, if at all. Aided by the proof given, the policy in question must be construed as insuring spirits of turpentine and gunpowder, together with the other goods, as much as though these articles had been specifically mentioned as insured in the policy. In *Harper v. Albany Mutual Insurance Company*,<sup>1</sup> it was held that a policy upon premises privileged for a printing-office, upon its being shown that the use of camphene was necessary in conducting the business, implied an assent by the insurer to its being kept upon the premises for such use, although the restriction to its being kept upon the premises was similar to that as to spirits of turpentine and gunpowder in the present case, and that so keeping and using it did not avoid the policy. In *Harper v. City Insurance Company*,<sup>2</sup> a similar rule was not only held, but a majority of the court went farther, and held that although the policy contained a printed clause exempting the insurer from damage for loss sustained from camphene kept upon the premises for use, yet that this exemption did not apply to a loss from fire caused by igniting camphene so kept, accidentally, by a lighted match. It is not necessary to go to any such extent in the present case. We have seen that in the present case the policy, properly construed, covered gunpowder and spirits of turpentine; and when these articles are insured, a printed clause prohibiting their being kept is plainly repugnant to the written clause insuring them; and, by the authority of the cases above cited, the printed clause must be governed by the written. The policy was, therefore, not void at the time of the fire by reason of keeping the spirits of turpentine and gunpowder. It cannot be held that the effect of the printed clause in the present case is to except spirits of turpentine and gunpowder from the general description of the property insured, without overruling *Harper v. Albany Insurance Company* and *Harper v. City Insurance Company*.<sup>3</sup> The insurer is presumed to have known what articles were usually kept in country stores, and, consequently, that the policy covered the powder and turpentine."

A policy insuring all the articles constituting the stock of a pork-house, and all articles contained within the building described, and appurtenant thereto, covers — such being the usage of the pork-packing business — all the property within the building, without regard to the particular ownership, or any part of it intended to be insured.<sup>4</sup>

§ 119. Increase of Risk. — In determining whether or not there has been an increase of risk, it is necessary to ascertain what the parties must be presumed

<sup>1</sup> 17 N. Y. 191.

<sup>2</sup> 22 N. Y. 441, *ante*, p. 157.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Etna Ins. Co. v. Jackson*, 16 B. Mon. 212; *Jackson v. Etna Ins. Co.*, 16 B. Mon. 242.

## Fire Insurance.

to have contemplated when the insurance was made, and this involves a consideration of the usages and incidents of the risk; because, if the change was one warranted by the usages or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated by the parties. This rule is in these words well and succinctly stated by Mr. Wood:<sup>1</sup> "Generally, it may be said that any alteration or change in the risk made subsequent to the insurance, and which has the effect of materially increasing the risk, will avoid the policy."<sup>2</sup> But a policy on a dwelling-house, unoccupied when the policy was issued, would not be invalidated by its subsequent occupancy and setting up therein stoves and other appliances usually employed to heat the building, nor by using light, unless expressly prohibited by the policy, because those acts are customary in the use of a dwelling-house.<sup>3</sup> So of ordinary repairs to a building.<sup>4</sup> A study of a few leading cases will make clear the extent of usage in qualifying the general rule as to alterations in fire insurance. In *Dobson v. Sotheby*,<sup>5</sup> which came before Lord TENTERDEN, C. J., in 1827, the policy insured buildings "in which no fire is kept, and no hazardous goods are deposited." The buildings requiring tarring, a fire was lighted therein, and a tar-barrel brought into the building, and in the absence of the plaintiff's servants, and by his negligence, the tar boiled over, took fire, and destroyed the premises. It was contended for the insurer that the plaintiff could not recover, "because the lighting a fire within the building was a contravention of the terms of the policy, which required that no fire should be kept in the buildings; and that the tar-barrel came under the description of hazardous goods, and, therefore, that bringing it within the premises was a breach of the policy." But Lord TENTERDEN, C. J., ordered judgment for the amount of the policy, saying: "Nor do I think that the circumstances relied on furnish any answer to the action. If the company intended to stipulate not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the habitual use of fire or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen." In *Billings v. Tolland County Mutual Fire Insurance Company*,<sup>6</sup> the policy insured two barns, and contained the fol-

<sup>1</sup> Wood on Ins., § 238.

<sup>2</sup> Wood on Ins., § 226; *Jones v. Firemen's Fund Ins. Co.*, 51 N. Y. 318; *Jones v. Manufacturers' Ins. Co.*, 8 Cush. 82; *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M. 472; *Allen v. Insurance Co.*, 2 Md. 111; *Billings v. Tolland, etc., Ins. Co.*, 20 Conn. 139; *Jefferson Ins. Co. v. Cothent*, 7 Wend. 72; *Williams v. People's Ins. Co.*, 57 N. Y. 274.

<sup>3</sup> Wood on Ins., § 238.

<sup>4</sup> *Franklin Fire Ins. Co. v. Chicago Ice*

*Co.*, 32 Md. 102; *Rann v. Home Ins. Co.*, 59 N. Y. 387; *Padelford v. Providence, etc., Ins. Co.*, 3 It. 1. 102; *Sanford v. Mechanics', etc., Ins. Co.*, 12 Cush. 541; *Hatchkiss v. Germania Ins. Co.*, 5 Hun. 90; *Grant v. Howard Ins. Co.*, 5 Hill. 10; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122; *Townsend v. North-Western Ins. Co.*, 18 N. Y. 168; *Jolly v. Baltimore Equitable Soc.*, 1 Har. & G. 295.

<sup>5</sup> 1 Moo. & M. 90.

<sup>6</sup> 20 Conn. 139.

## Changes in Premises.

following clause: "All the above described barns are used for hay, straw, grain unthreshed, stabling, and shelter, including the one used in part as a barn and in part as a cider and threshing mill." On the day preceding the night of the fire, the plaintiff had caused some bushels of lime to be placed in the barn, to be used for rolling it in wheat which he was about to sow. He had also some time previous commenced painting his house, and in the barn, at the time of the fire, had been left a quantity of oil, lead, and mixed paint. The jury having found a verdict for the plaintiff, a new trial was refused by the Supreme Court of Errors of Connecticut. "The acts done by the plaintiff," said WAITE, J., "are set forth in the motion, so that we can see what they were, and whether they were a departure from the common and ordinary use of such buildings. We very well know that farmers in this State are in the habit of using their barns for a variety of purposes connected with their agricultural business besides that of storing their hay and stabling their cattle. Their barns are frequently used as a shelter for their wagons, ploughs, sleds, and other farming-implements. When the plaintiff caused an insurance to be effected on the buildings upon his farm, it is not to be presumed that he meant to deprive himself of their common and ordinary use, or that the defendants by their policy intended any such thing. And, excepting so far as there is an express prohibition in relation to the use of them,—as, in the keeping of ashes,—the understanding of the parties unquestionably was that the common and ordinary use of them was to be continued, in the same manner as if the policy had never been executed. \* \* \* The plaintiff prepared and left in it the steep for his seed-wheat, and stored in it the paints which he was using for painting his house. We discover nothing in these acts more than what is usual and common among farmers." In *Washington Fire Insurance Company v. Davison*,<sup>1</sup> the policy covered a "two-story brick building used as a sulphuric-acid factory." The policy contained a stipulation that any alteration or change in the risk, increasing the hazard, should invalidate the insurance. The assured subsequently erected a shed between the two buildings, for the purpose of protecting the machinery and apparatus employed in the building for the purposes specified. The insurer defended against a loss upon the ground that the shed increased the risk, and was a breach of the conditions. But the Court of Appeals of Maryland held that even though the risk was thereby increased, yet if the erection of the shed was necessary and usual for the protection of the machinery and apparatus, it would not affect the liability of the insurer.

§ 120. **Changes in adjoining Premises.**—It is settled that, unless specially provided for in the policy, the assured is not bound to inform the insurer of any changes in adjoining premises, however much the risk may be thereby enhanced. By not making this a condition of the policy, the insurer accepts all the risk incident to such changes.<sup>2</sup> So, in *Stebbins v. Globe Insurance Company*,<sup>3</sup> where the policy contained no such condition, and evidence was offered, and rejected by the trial court, that by a usage at New York (the contract being made in New York, but the property being situated in Mobile), upon the occurring of any

<sup>1</sup> 30 Md. 91.

<sup>2</sup> *Wood on Ins.*, § 117; *Miller v. Western Farmers', etc., Ins. Co.*, 1 Handy, 209; *Gates*

*v. Madison County Ins. Co.*, 5 N. Y. 469; *Stebbins v. Globe Ins. Co.*, 3 Hall, 632.

<sup>3</sup> 2 Hall, 632.



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circumstance whereby the risk was increased by the act of the assured after the effecting of the insurance, notice thereof was to be given to the insurers, so that they might have the option of continuing the policy or annulling it, on appeal the ruling was affirmed. The decision of the higher court did not rest altogether upon its being a usage local to New York, but upon the ground that "if it were a general usage, it could not be given in evidence to alter the legal operation and effect of the policy."

§ 121. **Amount of Loss.**—Where there is no direct evidence as to the amount of loss which has been sustained in a particular case, evidence may be given of the amount of stock which, by the general course of the same trade, the plaintiff would be likely to have had on hand at the time of the fire. Thus, in a suit on a policy of insurance on a stock of groceries in a retail store, the plaintiffs testified that their sales during the year preceding the fire were about \$120,000, and that the goods in the store on the day of the loss were worth at their cost value \$65,000. It was held in the Supreme Court of the United States that the testimony of witnesses living in the same town and engaged in the same business was competent to show that grocery merchants in that town, for the six years prior to the fire, had not had on hand at any one time more than one-fifth of their annual aggregate sales; that this was the case on the day the fire occurred, and that therefore, by the general course of trade in that branch of business in the town, the plaintiff's loss could not have exceeded \$24,000.<sup>1</sup>

§ 122. **Payment of Losses—Mutual Companies.**—Where a fire-insurance company agreed in its policy that their directors should "settle and pay to the assured all losses within three months after notice shall have been given as aforesaid, and that the payment of the loss ascertained should be made within the time prescribed by the charter, without deduction from the sum decreed by the adjustment," proof of a usage on the part of the company, in case of a total loss, to retain of the amount of the ascertained loss two per cent per month on the balance of the premium-note, from the date of the last assessment upon it until the expiration of the term of the policy, was rejected. "The object and effect of the proof offered of the usage in this case," said Woods, J., "was plainly to vary and limit the plain and unequivocal terms of the policy, and to control and limit their construction and legal effect. To give the evidence of the usage the effect claimed for it, would be to allow the exact converse of the true and well-settled rule of law upon this subject to prevail. It would be to hold that while the contract, in express and unmistakable terms, provides that the whole loss shall be ascertained and paid to the assured, the usage shall control the express terms, and give them the effect of a contract for the payment of a sum less than the whole loss sustained. It would be to allow the usage to control an express written contract, and to limit its terms and effect; while it is well settled, in accordance with sound reason, too, that a usage shall be regarded as waived by the express terms of a contract, when they are in conflict with each other."<sup>2</sup> Although a mutual company may have been in the habit of surrendering the notes of its members and cancelling their policies upon the happening

<sup>1</sup> Insurance Co. v. Weide, 13 Wall. 438.

<sup>2</sup> Swamscot Machine Co. v. Partridge, 25 N. H. 399.



## Payment of Premiums.

and payment of losses, such a practice cannot avail to contradict or vary the written terms of a policy or premium-note.<sup>1</sup>

§ 123. **Reinsurance.**—Reinsurance is a contract of indemnity to the reassured, and binds the reinsurer to pay to the reassured the whole loss sustained in respect of the subject insured, to the extent to which he is reinsurer.<sup>2</sup> Therefore, it has been held not competent to limit a contract of reinsurance by proof of a usage in the city of New York by which the reinsurer paid the same proportion of the entire loss sustained by the original insured, that the sum reinsured bore to the first insurance written by the insured; that is to say, that if A. write a policy for \$20,000, and then procure B. to reinsure him for \$10,000 on the same property, in the event of a loss occurring to the amount of \$10,000, B. would be liable to pay to A. only \$5,000, instead of the \$10,000 written in the policy.<sup>3</sup> "The word 'reinsure,'" said SANDFORD, J., "has a definite meaning, settled in the law for two centuries past, and having the same meaning in its ordinary and popular sense. It is equally effective with the word 'insure;' and it has been decided that the word 'insure' may be used in a policy of reinsurance with the same force and validity. The proof offered attempts to wrest the term 'reinsure' from the established sense, and make it correlative as between the first insurer and the reinsurer wherever the former insures more than the latter, with the distinct and different contract of double insurance. In our view, it seeks to vary an express agreement between these parties, couched in plain language, having an established legal as well as conventional meaning, and we are entirely clear that the testimony of usage ought not to be received." So, in an English life-insurance case, a majority of the judges of the Queen's Bench were averse to allowing the introduction of a custom, in case of reinsurance, to confine the declaration as to health to the state of the health at the time of the original insurance.<sup>4</sup>

§ 124. **Life Insurance—Payment of Premiums—Policy.**—In *Baxter v. Massachusetts Insurance Company*,<sup>5</sup> it was held to be competent to prove a usage that where there has been a verbal agreement for insurance, and the terms agreed upon and entered on the books of the company, the contract of insurance is considered as valid for the insured, although the premium is not paid. Can a usage on the part of life-insurance companies to allow thirty days grace for non-payment of premiums due, where by its terms the policy is to be forfeited if the premiums are not paid on the very day mentioned—can a usage of this character be admitted in evidence to save a forfeiture by the terms of the policy? In Georgia, it has been held that it cannot;<sup>6</sup> in Pennsylvania, that it can.<sup>7</sup> The ruling in the latter case is certainly more in accord with the rules regarding the

<sup>1</sup> *Mutual Fire Ins. Co. v. Raud*, 21 N. H. 42.

<sup>2</sup> 2 Park on Ins., §§ 595, 596; 2 Ph. on Ins., §§ 58, 749; 3 Kent's Comm. 279; *Hastie v. De Peyster*, 3 Caines, 190; *Merry v. Prince*, 2 Mass. 170; *New York, etc., Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359; *New York, etc., Ins. Co. v. Protection Ins. Co.*, 1 Story, 458.

<sup>3</sup> *Hone v. Mutual Safety Ins. Co.*, 1 Sandf.

137; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235.

<sup>4</sup> *Foster v. Mentor Life Assur. Co.*, 3 El. & Bl. 48.

<sup>5</sup> 13 Allen, 320.

<sup>6</sup> *Mutual Benefit Life Ins. Co. v. Ruse*, 5 Ga. 584.

<sup>7</sup> *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. St. 167.

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admissibility of evidence of custom and usage. The only reason given by the Georgia court for rejecting the evidence is that there is no ambiguity in the contract, and that "usage is provable only where there is ambiguity in the policy." It is, perhaps, sufficient to say that the case of ambiguity in the instrument is only one of the many reasons for permitting the introduction of such evidence to explain, or sometimes to change its apparent meaning, which have been recognized by the courts. Another, and a very prominent instance in the books, is where an incident to the contract is to be proved: something which the parties to it did not reduce to writing, but which they understood as attaching to it in accordance with the usages of the trade concerning which they contracted. Now, it is obvious that in such a contract there may be on its face no ambiguity whatever. Therefore, the reasons given by the Supreme Court of Pennsylvania, and the rule adopted by it in the case last cited, seem valid and proper. "It might have been a difficult thing," said THOMPSON, C. J., "to prove such a custom, but that was not a good ground on which to refuse the offer. It was the plaintiff's right to prove it if she could; and we are to take it, for the purpose of this investigation, that she could have proved it. Would it have been efficient proof for any purpose, had it been admitted? We think that it would, although generally a contract is the law of the transaction in which it exists, and is not to be affected by anything but its terms,—that is to say, it cannot be abridged or enlarged in itself by anything else,—yet there are many cases in which its execution is materially curtailed by usage or custom. Days of grace on commercial paper are a familiar instance. By a custom grown into law, it is not due until the expiration of three days after it purports to be; or, rather, the remedy is suspended against parties for that period. So, in agriculture, although the lease may fix the duration of the term and when it is to end, yet the tenant, by custom, has rights in the premises after it is ended: to harvest and carry away his share of what the custom calls the waygoing crop. This custom seems to do more than curtail the remedy; it in fact enlarges the contract. But no custom is more perfectly established, or more thoroughly stands on a solid foundation as law. There are customs which interpret marine contracts to the extent of apparent changes in them. In *Peake's Nisi Prius*,<sup>1</sup> in the case of *Chaurand v. Angerstein*, it was shown that, by custom, a stipulation in a policy of insurance that a vessel was to sail in October meant that she was to sail between the 25th of the month and the 1st or 2d of November. While a custom, as a general rule, may not be heard to affect the terms of a statute or contract to the extent of enlarging or abridging the force of it, yet it may interpret either." The principle on which this case rests is approved in other cases.<sup>2</sup> But this exception could hardly be extended to cover a case where the payment was made after the death of the insured.<sup>3</sup> It has been held in Illinois that where the application fixed the time for the contract to take effect, a custom on the part of the company that its policies should take effect on a different day was

<sup>1</sup> Page 43.

<sup>2</sup> *Pino v. Merchants' Mutual Ins. Co.*, 19 La. An. 214; *Howell v. Knickerbocker Ins. Co.*, 44 N. Y. 276; *Ruse v. Mutual, etc., Ins. Co.*, 26 Barb. 557; *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Thompson v. St. Louis Mutual Ins. Co.*, 52 Mo. 469. And see *Thompson v.*

*Knickerbocker Ins. Co.*, 3 Cent. L. J. 561; *Georgia Masonic, etc., Ins. Co. v. Whitman*, 52 Ga. 419; *Busby v. North American Ins. Co.*, 40 Md. 572; *Hanley v. Life Assn.*, 4 Mo. App. 253.

<sup>3</sup> *Sullivan v. Cotton States Ins. Co.*, 43 Ga. 423.

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not admissible, because contradicting the application;<sup>1</sup> and evidence that an agent frequently waived a condition as to payment is not admissible to raise an inference of waiver in a particular case, in the absence of other proof tending to establish it.<sup>2</sup>

§ 125. **Other Cases.** — In a Scotch case, it was ruled that where the defence to a life-policy was that a habit of dram-drinking was concealed in the application, it was incompetent to ask whether the party was reputed a dram-drinker. The proper way was to prove the number of drams he took, and then ask a medical man what effect they would have.<sup>3</sup> A usage of a company to require particular proof of death by the family physician of the insured cannot bind the latter, unless it was known to him when he took the policy.<sup>4</sup> And it is not competent to show that a person addicted to intoxicating liquor is not regarded as an insurable subject by persons engaged in the business of life insurance.<sup>5</sup>

## V. LANDLORD AND TENANT.

§ 126. **Customs in the Law of Landlord and Tenant.** — In the relation of landlord and tenant, the custom of the country has in England imposed upon both obligations and duties which the law has recognized and enforced. In farming leases, for instance, it is usual for the lessee to covenant that he will manage his farm in a husband-like manner; but it is settled that, in the absence of any such covenant, the mere relation of landlord and tenant creates an implied obligation to farm according to the custom of the country.<sup>6</sup> Whether the cutting of any given wood is waste or not, may be determined by local custom.<sup>7</sup> Every agreement between landlord and tenant in respect to matters on which the writing is silent, is open to explanation by the general usage and custom of the county or district in which the land lies. Thus, evidence of usage is admissible to show to what extent, and on what property rent is collectible.<sup>8</sup> In *Aughinbaugh v. Coppeneheffer*,<sup>9</sup> the lease stipulated that the tenant "shall cultivate and farm said land in a workman-like manner. He shall put out all the crops in good season and in proper order, of such kind of grain and in such fields as the landlord shall designate. He shall also take off all crops in proper season, and house the same in proper order." In an action by the tenant for work and

<sup>1</sup> *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516.

<sup>2</sup> *Wood v. Poughkeepsie, etc., Ins. Co.*, 32 N. Y. 619.

<sup>3</sup> *Promoter Life Ins. Co. v. Barrie*, 5 Murr. 135.

<sup>4</sup> *Taylor v. Aetna Ins. Co.*, 13 Gray, 434.

<sup>5</sup> *Rawls v. American, etc., Ins. Co.*, 27 N. Y. 282.

<sup>6</sup> *Powley v. Walker*, 5 Term Rep. 373; *Legh v. Hewitt*, 4 East, 154; *Angerstein v. Handson*, 1 Cramp. M. & R. 789; *Earl of Falmouth v. Thomas*, 1 Cramp. & M. 89; *Hallifax v. Chambers*, 4 Mee. & W. 662; *Martin v. Gilham*, 7 Ad. & E. 540; *Bickford v. Parson*, 5 C. B. 920; *Wilkins v. Wood*, 17 L. J. (Q. B.) 319; *Sutton v. Temple*, 12 Mee. & W. 52; *Stafford v. Gard-*

*ner*, L. R. 7 C. P. 242; *Gallagher v. Shipley*, 24 Md. 418; *Barrington v. Justice*, 2 Clark (Pa.), 501; *Willey v. Conner*, 44 Vt. 68; *Smithwick v. Ellison*, 2 Fred. L. 326; *Daniels v. Pond*, 21 Pick. 367; *Lewis v. Lyman*, 22 Pick. 437; *Lassell v. Reed*, 6 Greenl. 222.

<sup>7</sup> *Taylor's L. & T.*, § 350; *Honeywood v. Honeywood*, L. R. 18 Eq. 306.

<sup>8</sup> *Mangum v. Farrington*, 1 Daly, 236. A stipulation in a farming lease that the crop, when harvested, shall be divided according to the custom prevailing among the farmers of the neighborhood in which the land is situated, is valid. *Olem v. Martin*, 34 Ind. 341.

<sup>9</sup> 53 Pa. St. 347.

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labor, it was held proper to show that by the usual course of husbandry in the vicinity, a tenant about to take possession in the next spring, or to hold over, should prepare his corn-ground in the preceding fall or winter, whenever possible, and that he could spread on such corn-ground all the fertilizers which the landlord might furnish for that purpose, without any stipulation in the lease, and without entitling him to charge the landlord therefor.

§ 127. As to the "Waygoing" Crop. — At the common law, "if a tenant for years, knowing the end of his term, doth sow the land, and his term endeth before his crop is ripe, the lessor, or he in reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end."<sup>1</sup> In the leading case of *Wigglesworth v. Dallison*,<sup>2</sup> a custom of the country to give the tenant the waygoing crop was sustained.<sup>3</sup> A similar custom has been recognized in America. The custom of the country allowing to the tenant the "waygoing crop"—that is, the crop sown by the tenant during the lease, but coming to maturity after its expiration—has been established in Pennsylvania. The reasonableness of a custom which would relieve a tenant from paying for land without having the benefit of the crop prevailed upon Chief Justice McKEN, before the decision in *Wigglesworth v. Dallison* was known in this country, and was recognized by the Supreme Court in almost the same words as were used by Lord MANSFIELD in that case.<sup>4</sup> In Delaware it is established that the waygoing

<sup>1</sup> Co. Lit., § 68.

<sup>2</sup> 1 Doug. 207, *ante*, p. 169.

<sup>3</sup> *Boraston v. Green*, 16 East, 71; *Griffiths v. Puleston*, 13 Mee. & W. 358; *Holding v. Pigott*, 7 Bing. 465; *Beavan v. Delahay*, 1 H. Black. 5; *Caldecott v. Smythies*, 7 Car. & P. 108.

<sup>4</sup> *Stultz v. Dickey*, 5 Binn. 285. *Tilghman, C. J.*: "When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted. Both parties are supposed to know it and to be bound by it, unless provision to the contrary is made in the contract. It appears to me, therefore, that it was proper to admit evidence of the custom concerning the waygoing crop. I understand that this custom had been recognized by a decision at *Nisi Prius* prior to this action, and that the law had been held as it is laid down in the case of *Wigglesworth v. Dallison*. There the custom was limited to a particular part of England. With us it is supposed to extend throughout the State. In the nature of the thing, it is reasonable that where a lease commences in the spring of one year and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop. If the parties

intend otherwise, it is easy to control the custom by an express provision in the lease." *Yeates, J.*, said the question had been settled by the case of *Diffendorfer v. Jones*, decided in 1782, and in which he was of counsel. "Though I was dissatisfied with the opinion then delivered," he adds, "I have never heard the doctrine questioned since. I have adverted to this case in *Carson v. Blazer*, 2 Binn. 487. Such custom is set in our books not to alter or contradict the agreement in the lease, but only to supply a right which is consequential to the risk, although not mentioned therein. There can be no doubt, if the tenant was restricted by the terms of his lease from removing a grain after his time was expired, that he would be bound by his contract; and I apprehend the privilege of the tenant, in general, is confined to a reasonable quantity of the lands in proportion to the residue thereof, according to the course and usage of husbandry in the same parts of the country. The privilege is founded on the highest equity, and conduces to the extension of agriculture." In *Carson v. Blazer*, 2 Binn. 487, he had said: "I well recollect that on the trial of *Diffendorfer v. Jones*, before all the judges of this court at *Nisi Prius*, in this place, we urged on the part of the plaintiffs the established common-law doctrine that the landlord, after the end of a term for

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tenant is entitled, by the custom of the State, to the wheat crop; not so, however, as to the oat crop,<sup>1</sup> though it seems that an incoming tenant may enter to fill his ice-house, "necessity and custom requiring it, \* \* \* as much as that the waygoing tenant shall return to reap his wheat crop."<sup>2</sup> *Wigglesworth v. Dallison* has been followed in New Jersey,<sup>3</sup> Ohio,<sup>4</sup> and Maryland;<sup>5</sup> but not in Virginia,<sup>6</sup> nor in Canada.<sup>7</sup>

§ 128. **Other Customs.**—A custom that a tenant may leave his waygoing crop in the barn of the farm after he has quitted the premises, is good;<sup>8</sup> and a usage for the offgoing tenant of a farm in a particular district to bestow his work, labor, and expense in manuring, tilling, fallowing, and sowing, according to the course of husbandry, is valid and reasonable.<sup>9</sup> Where a custom to pay for fallows was proved, it was held that there was therefore an implied contract on the part of the landlord that, if there be no incoming tenant, he will pay the outgoing tenant according to the custom.<sup>10</sup> In a very recent English case (June 25, 1880), a motion was made in vacation to restrain an outgoing tenant of a farm in Devonshire from selling the hay and straw off his farm. It was contended that he held under a lease prohibiting the same; or, otherwise, that he held as a yearly tenant, and was prevented by the custom of the country from removing the hay and straw. The tenant had been offered a lease, but had refused to execute the same, and therefore the question depended on the custom of the country. For the defendant, two surveyors and auctioneers of this class of crops stated they knew of no such custom; but, for the plaintiff, seven farmers stated it was a well-known custom where the property was not held under any agreement. The plaintiff offered to give an undertaking in damages if the injunction were granted. POLLOCK, J., said it was clear that if the defendant held under a lease, he could not have taken the hay and straw; but as he did not hold under any agreement, the question depended on the custom of the country. As to such a custom, in his experience, you could always get evidence

years for which the lands were leased, was entitled to the exclusive possession, and that it was the folly of the tenant to put in a crop which he could not remove during the continuance of the lease. But we were told by McLean, C. J., that the tenant was justified by the custom of the country in what he had done, and that the strict common-law rule did not apply to the case. This was previous to the publication of the report of *Wigglesworth v. Dallison* amongst us, wherein it was held that a custom that tenants should have the waygoing crop, after the expiration of their term, was good. I was then dissatisfied with the decision of the court, considering it as an innovation on settled law. It made a strong impression on my mind, which was increased by the circumstance of Judge Bryan copying the English case from the book (Doug. 190, 201), which arrived some time after, and furnishing me with it at the ensuing court." And see *Demi v. Bossler*, 1 Penn. 224; *Iddings v.*

*Nagle*, 2 Watts & S. 22; *Biggs v. Brown*, 2 Serg. & R. 14; *Clark v. Harvey*, 54 Pa. St. 142; *Craig v. Dale*, 1 Watts & S. 509; *Forsythe v. Price*, 8 Watts, 282; *Hunter v. Jones*, 3 Brews. 370; *Comfort v. Duncan*, 1 Miles, 229.

<sup>1</sup> *Templeman v. Biddle*, 1 Harr. (Del.) 523.

<sup>2</sup> *The State v. McClay*, 1 Harr. (Del.) 520.

<sup>3</sup> *Van Doren v. Everitt*, 2 South. 460; *Howell v. Schenck*, 24 N. J. L. 89; *Society v. Haight*, 1 N. J. Eq. 393.

<sup>4</sup> *Foster v. Robinson*, 6 Ohio St. 90.

<sup>5</sup> *Dorsey v. Eagle*, 7 Gill & J. 331.

<sup>6</sup> *Harris v. Carson*, 7 Leigh, 632; *Mason v. Moyers*, 2 Rob. (Va.) 606. And see *Kelley v. Todd*, 1 W. Va. 197.

<sup>7</sup> *Burrowes v. Caines*, 2 Upper Canada Q. B. 288.

<sup>8</sup> *Beavan v. Delahay*, 1 H. Black. 5; *Lewis v. Harris*, 1 H. Black. 7.

<sup>9</sup> *Dalby v. Hirst*, 3 J. B. Moo. 566; 1 Brod. & B. 224.

<sup>10</sup> *Faviell v. Gaskoin*, 7 Exch. 273.

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on both sides; but what pressed with him was the fact that the defendant had had the benefit of the hay and straw in coming upon the farm. He thought the existence of the custom sufficiently proved; and as the plaintiff offered an undertaking in damages, he should grant the injunction asked for until the trial.<sup>1</sup>

A local custom requiring a lessor to cleanse a leased house before the lessee enters into possession of it, is not binding on one not having knowledge of it. The right of proprietors of a common stairway to the use of the walls to put up business signs of tenants exists by custom.<sup>2</sup>

It was early held in South Carolina that a custom in the city of Charleston which authorized the owner of a lot of land, after notice to the owner of the adjoining lot, and his refusal to join in putting up a partition fence, to put up such fence at his own expense and hold the party refusing for one-half the cost, was reasonable and valid.<sup>3</sup> And a custom is valid that when persons owning adjoining lots build simultaneously adjoining houses, having a common wall built equally on each lot, each is bound to contribute to the cost of the wall.<sup>4</sup>

It is held in Indiana that the rule that where there is no covenant in the lease by which the lessor undertakes to repair, he is not bound to do so, and the lessee cannot make repairs and charge the cost to him,<sup>5</sup> cannot be altered by a local custom.<sup>7</sup> And the general rule, on the sale of property, that the vendee who bears the expense of the conveyance shall prepare it,<sup>8</sup> may be altered by custom, which may say, for example, that on an agreement for a lease the lessor shall prepare it and the lessee pay for it.<sup>9</sup>

§ 129. As to Term of Tenancy. — The custom of the country has frequently been resorted to for an explanation where the question of the time of a holding has been left in doubt.<sup>10</sup> It has been held that, although the express terms of a lease cannot be controlled by the custom of the country, if the lease is entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time.<sup>11</sup> Where the holding was general from "Michaelmas," the custom of the country as to whether that shall be deemed old or new Michaelmas was held to be admissible in evidence.<sup>12</sup> Evidence of the custom of the country was held admissible for the purpose of showing that a letting by parol from "Lady-day" meant "old Lady-day."<sup>13</sup> In another case, where the rent was payable at "Martinmas," the court thought themselves bound by statute as to when the day came;<sup>14</sup> and in a *Nisi Prius* case, ERLE, C. J., remarked: "The custom of the country cannot be set up against the legal presumption that Michaelmas means any other day than the 29th of September. You must show

<sup>1</sup> Carlyon v. Hayward, 24 Sol. J. 807.

<sup>2</sup> Sawtelle v. Drew, 192 Mass. 228.

<sup>3</sup> Bennett v. Seligman, 32 Mich. 500.

<sup>4</sup> Knox v. Artman, 3 Rich. L. 283; Chichester v. Walker, 3 Rich. L. 284.

<sup>5</sup> Rowland v. Hanna, 2 B. Mon. 131.

<sup>6</sup> Wabash, etc., Canal Co. v. Brett, 25 Ind. 409; Womack v. McQuarry, 28 Ind. 103; Kellenberger v. Foresman, 13 Ind. 478.

<sup>7</sup> Biddle v. Reed, 33 Ind. 529.

<sup>8</sup> Price v. Williams, 1 Mee. & W. 6; Poole v. Hill, 6 Mee. & W. 835; Stephens v. De Medina, 4 Q. B. 422; Duke of St. Albans v.

Shore, 1 H. Black. 274; Doe v. Stillwell, 8 Ad. & E. 645; Hallings v. Connard, Cro. Eliz. 517; Helps v. Clayton, 17 C. B. (N. S.) 553.

<sup>9</sup> Grissell v. Robinson, 3 Bing. N. C. 11.

<sup>10</sup> Martyn v. Clue, 18 Q. B. 681; White v. Nicholson, 4 Man. & G. 95.

<sup>11</sup> Webb v. Plummer, 2 Barn. & Ald. 746.

<sup>12</sup> Finley v. Wood, 1 Esp. 178; Doe v. Benson, 4 Barn. & Ald. 588; Doe v. Lea, 11 East, 312.

<sup>13</sup> Doe v. Benson, *supra*.

<sup>14</sup> Smith v. Walton, 8 Bing. 238; Kearney v. King, 2 Barn. & Ald. 301.



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by direct evidence that this was an old Michaelmas tenancy."<sup>1</sup> And a local custom that a lease from the first day of May in one year to the first day of May in a succeeding year expires at noon of the last day, has been held in New York to be not only valid, but convenient to all concerned.<sup>2</sup>

§ 130. **Explaining Terms in Lease.**—In the leading case of *Smith v. Wilson*,<sup>3</sup> where, in a lease of a rabbit warren, the lessee covenanted that at the expiration of his term he would leave on the warren 10,000 rabbits, the lessor paying for them at the rate of £60 per 1,000, it was held by the Court of Queen's Bench that parol evidence was admissible to show that by the custom of the country where the lease was made, "1,000," as applied to rabbits, meant "1,200."

§ 131. **As to Fixtures.**—*Culling v. Tuffnal*,<sup>4</sup> decided in 1674, is thus reported: "In trover, for ten loads of timber. The case was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns so, in order to carry them away at the end of the term, a verdict was given for the defendant." This ruling, it has been since thought, might properly have been placed on another ground, as the property in question, not being fixed to the ground, could not rightly be claimed by the landlord. But evidence similar to that admitted in *Culling v. Tuffnal* has been allowed in subsequent cases for the purpose of determining whether or not, as between landlord and tenant, or other claimants, certain structures were to be considered as fixtures. Thus, in *Davis v. Jones*,<sup>5</sup> where it had been usual to value a particular article between outgoing and incoming tenant, this custom was held to govern in determining the nature of the property. "Such a practice," said ABBOTT, C. J., "could not rationally have prevailed if the things had not been generally understood to be in their nature capable of removal, and not fixtures, properly so called; and, therefore, taking the practice as an explanation of their nature and character, we think they are to be considered as personal chattels." In this country, Mr. Justice STORY held it competent to prove a usage in the city of Washington authorizing a tenant to remove any building which he might erect upon leased premises, provided the same was removed before the expiration of the term;<sup>6</sup> and, following this ruling, the Supreme Court of Wisconsin, in 1860, recognized a similar custom in the city of Milwaukee.<sup>7</sup>

But in a Pennsylvania case it was held that a planing-mill, lathes, and vises in a machine-shop or car-factory were fixtures, and as such belonged to the realty, irrespective of the manner in which they were attached to the building in which they were used, if they were a necessary part of the machinery in carrying on the business, — following previous rulings to that effect in that State,<sup>8</sup>— and that "it

<sup>1</sup> *Hogg v. Berrington*, 2 Post. & Fin. 246.

<sup>2</sup> *Wilcox v. Wood*, 9 Wend. 346.

<sup>3</sup> 3 Barn. & Adol. 723, *post*, Chap. IV.

<sup>4</sup> Bull. N. P. 34.

<sup>5</sup> 2 Barn. & Adol. 166. And see *Watherell v. Howells*, 1 Camp. 34.

<sup>6</sup> *Van Ness v. Pacard*, 2 Pet. 137.

<sup>7</sup> *Keogh v. Daniell*, 12 Wis. 163. And see *Teaff v. Hewitt*, 1 Ohio St. 511. In *Viner's*

*Abridgment*, 154, § 11, it is said: "A granary built on pillars in Hampshire is a chattel, and goes to the executors, and may be recovered in trover. This shall be understood according to the custom of the country."

<sup>8</sup> *Voorhis v. Freeman*, 2 Watts & S. 116; *Pyle v. Pennock*, 2 Watts & S. 390.

*Stillwell*, 8  
1, Cro. Eliz.  
7, s.) 553.

N. C. 11.  
; *White v.*

Ald. 746.  
*Doe v. Ben-*  
*ea*, 11 East,

*Kearney v.*



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was not in the power of the defendant to evade this rule of law by proving that there was a custom in opposition to it."<sup>1</sup> And in a Massachusetts case it was held that a steam-engine set upon a granite block and fastened down by a bolt, and a boiler set in bricks in such a manner that it could not be removed without taking down the bricks, both being used for running machinery in an adjoining shop, were realty, and that evidence of a general custom and usage between manufacturers and purchasers of such property to regard them as personalty was inadmissible.<sup>2</sup>

And, of course, where the parties have expressly contracted as to the fixtures, the custom of the country can have no weight. A lease contained a covenant to leave at the end of the term a water-mill, with all fixtures, fastenings, and improvements during the demise fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted. This was held to include a pair of new mill-stones, set up by the lessee during the term, although the custom of the country authorized him to remove them.<sup>3</sup> An assignment was made of a mill, "fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable." It was held that looms put up by the lessee of the mill for his convenience during the existence of his term, and fastened to the floor so as to be easily removable without injury to the freehold, passed thereunder, notwithstanding a custom in the trade not to regard such looms as fixtures.<sup>4</sup> But where a lease contained covenants on the part of the lessee to deliver up the premises at the end of the term, "reasonable use and wear thereof, and damages by accidental fire, or other accidents not happening through the neglect of the tenant, only excepted," these were held not inconsistent with a usage allowing the removal by a tenant of buildings erected by him on the premises.<sup>5</sup>

§ 132. **Not admissible to contradict Lease.**—But, as in the cases cited in the previous section, evidence of usage, though admissible to add to or explain, is never permitted to vary or contradict, either expressly or by implication, the terms of a written lease.<sup>6</sup> Where an action was brought by a landlord against an incoming tenant, and the declaration stated that, in consideration that the landlord would give up to the tenant possession of the farm, on which manure had been laid, and would permit him to have the benefit of the manure, he promised to pay the landlord for the same according to the custom of the country, and the breach alleged was non-payment, a written agreement was offered in evidence of the custom, which stated that the land had been manured with eight loads of manure per acre, and that the tenant agreed to leave the land, when given up by him, in the same state, or to allow a valuation to be made. Here it was held that the written agreement excluded the custom of the country, as it was inconsistent with it.<sup>7</sup> In *Roberts v. Baker*,<sup>8</sup> the question was whether a covenant in a lease, whereby the tenant bound himself not, on

<sup>1</sup> *Christian v. Dripps*, 23 Pa. St. 271.

<sup>2</sup> *Richardson v. Copeland*, 6 Gray, 536.

<sup>3</sup> *Martyr v. Bradley*, 9 Bing. 24.

<sup>4</sup> *Boyd v. Shorrock*, L. R. 5 Eq. 72.

<sup>5</sup> *Keogh v. Daniell*, 12 Wis. 163.

<sup>6</sup> See *Thorpe v. Eyre*, 1 Ad. & E. 928; *Staff-*

*ford v. Gardner*, L. R. 7 C. P. 242; *Sutton v. Temple*, 12 Me. & W. 52.

<sup>7</sup> *Clarke v. Roystone*, 13 Me. & W. 752; *Wiltshire v. Cottrell*, 1 El. & Bl. 674.

<sup>8</sup> 1 Cramp. & M. 808.

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quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. In that case Lord LYNDHURST said: "It was contended that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." In another case, it appeared that a tenant, by a clause in his lease, was bound, "at his removal, to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground," and the point in dispute was whether the tenant, under that contract, was or was not entitled to take away or sell the straw of the last or waygoing crop, and whether, if the tenant threatened to sell the straw, the lessor was entitled (the case having arisen in Scotland) to letters of suspension and interdict. It was held that the custom of the country could have no operation in such a case, as there was a contract between the parties, with provisions applicable to the point in dispute, and that, consequently, letters of suspension and interdict might be had and maintained by the lessor.<sup>1</sup>

§ 133. **When Lease not inconsistent with Custom.** — In the oft-cited case of *Hutton v. Warren*,<sup>2</sup> decided by the Court of Exchequer in 1836, it was held that a custom of the country by which the tenant of a farm, cultivating it according to good husbandry is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labor bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord if he will purchase it, was not excluded by a stipulation in the lease under which he held that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be spread on the land, for the use of the landlord, on receiving a reasonable price for it. The judgment of Mr. Baron PARKE in this case has been referred to with approval and quoted from at length both by Mr. SMITH in his notes to *Wigglesworth v. Dallison*,<sup>3</sup> and by Mr. BROWNE in his monograph on *Usages and Customs*.<sup>4</sup> "It has long been settled in commercial transactions," said Mr. Baron PARKE, "that evidence of a custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions in life in which known usages have been established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties

<sup>1</sup> *Roxburgh v. Robertson*, 2 Bli. 156. And see *Hughes v. Gordon*, 1 Bli. 287; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *White v. Sayer*, Palm. 211.

<sup>2</sup> 1 Mee. & W. 466.

<sup>3</sup> 1 Smith's Ld. Cas. 554.

<sup>4</sup> Page 35.

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did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into, and particularly under seal, may well be doubted; but the contrary has been established by authority, and the relations between landlord and tenant have been so regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrar course, and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the courts have been favorably inclined to the introduction of these regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties. Accordingly, in *Wigglesworth v. Dillison*, afterwards affirmed on a writ of error, the tenant was allowed an awaygoing crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such right, and Lord MANSFIELD said that the custom did not alter or contradict the lease, but only superadded something to it. The question subsequently came under the consideration of the Court of King's Bench, in the case of *Senior v. Armitage*, reported in Mr. Holt's Nisi Prius Cases. In that case, which was an action by a tenant against his landlord for compensation for seed and labor, under the denomination of tenant-right, Mr. Justice BAYLEY, on its appearance that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside the nonsuit, and held, as appears by a manuscript note of that learned judge, that though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that notwithstanding all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative 'unless the agreement, in express terms, excluded it;' and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron THOMPSON, who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument either expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron THOMPSON held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the disposal of the tenant, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labor. The next reported case on this subject is *Webb v. Plummer*, in which there was a lease of down-land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing

<sup>1</sup> See *Gibson v. Small*, 4 H. L. Cas. 397, per Parke, B.

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land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground), but the court held that as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more. The question, then, is whether, from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labor. The only clause relating to the management of the farm, except the covenant to repair, is one which stipulated that the plaintiff shall spend and consume on the farm three-fourths of the hay and straw arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the term, for the use of the landlord, on paying a reasonable price for the same. This provision introduces, and has a principal reference to a subject to which the custom of the country does not apply at all, — namely, the tithes, — and imposes a new obligation on the tenant *dehors* that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration by repurchasing a part of the produce in a particular event. It is by no means to be inferred from this provision that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid, on quitting, for the ploughing; or to plough, sow, and manure, he being paid for the manuring, the principle of *expressum facit cessare tacitum*, which governed the decision in *Wobley v. Plummer*, would have applied; but that is not the case here. The custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend."

If a lease contain no stipulations as to the mode of quitting, the offgoing tenant is entitled to his waygoing crop, according to the custom of the country, even although the terms of holding may be inconsistent with such a custom. Although this might at first sight seem repugnant to the doctrine stated in the previous section, it will, upon examination, be found to be in strict conformity with the principle of that doctrine; for the agreement under which the tenant held, in the case in which the above principle was enunciated, was silent altogether as to any terms on which the tenant should quit, and the clause of the agreement which was inconsistent with the custom of the country was a stipulation confined expressly to the period of holding by the tenant. It adverted to nothing that was to take place at the end of the tenancy, and spoke only of terms of holding during its continuance. There was, therefore, nothing in such an agreement at variance with the application of a custom between landlord and

<sup>1</sup> *Holding v. Pigott*, 7 Bing. 465.

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tenant which did not come into force until the expiration of the term. In that case, the rights of the landlord and tenant were governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards. It is clear that, as the agreement only referred to the continuance of the tenancy, both the landlord and tenant must have anticipated not only an end to the holding, but must have looked forward to a time when their mutual relations must be regulated by some other rule than that contained in the agreement. As there is nothing said as to the end, there is the ambiguity of silence, which the custom of the country can be called upon to explain.<sup>1</sup> Again: where, by the terms of a farm lease for seven years, expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country, and "during the term to consume with stock in the farm all the hay, straw, and clover grown thereon, which manure shall be used on the farm," and the landlord agreed to let the tenant occupy part of the homestead until midsummer, after the expiration of the term, if necessary, "to end the cropping of the tenant grown on the premises," it was held that the lease did not exclude the custom of the country, by which the tenant, having paid for straw on his incoming, was entitled to be paid for straw on his quitting.<sup>2</sup>

## VI. MASTER AND SERVANT — EMPLOYER AND EMPLOYEE.

In the relation of master and servant, and on all contracts for service, custom and usage are often important to determine the rights and liabilities of the parties. A majority of the cases in which this question has been determined by the courts have arisen upon the construction of written contracts of service, and will be found fully stated in a subsequent chapter, wherein the effect of usage in the construction of written instruments is discussed. Independently of this, however, several cases are to be found in the books, of more or less practical importance to the lawyer, and in which evidence of usage has been received to determine the length, the terms, and the proper performance of a servant's or an employee's engagement.

§ 134. **As to Terms or Conditions of Service.** — Usage may regulate the conditions of the employee's service. Thus, it may be admissible to show the length of a hiring<sup>3</sup> when there is no express agreement as to the time the servant is to work.<sup>4</sup> In *Cunningham v. Fonblanque*,<sup>5</sup> there was admitted in evidence a usage between the printers and proprietors of newspapers that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages.<sup>6</sup> In *Given v. Charron*,<sup>7</sup> which was an action for a wrongful dismissal, evidence of a custom among dry-goods jobbers in Baltimore that when a clerk or salesman begins a season without a special contract he cannot be dismissed till the end of it, and that the seasons are two, — one from January 1st to July 1st, and the other from July 1st to January 1st, — was admitted.

<sup>1</sup> Browne on Usages & Customs, 41.

<sup>2</sup> *Muncey v. Dennis*, 1 Hurl. & N. 216.

<sup>3</sup> *The Swallow*, 10 C. Adm. 334; *Harris v. Nicholas*, 5 Munt. 483.

<sup>4</sup> *Gleason v. Walsh*, 43 Me. 397.

<sup>5</sup> 6 Car. & P. 44. And see *Perkins v. Jordan*, 35 Me. 23.

<sup>6</sup> *Cunningham v. Fonblanque*, 6 Car. & P. 44.

<sup>7</sup> 15 Md. 502.

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"We think," said the court, "the testimony was properly admitted. It was pertinent to the contract declared upon, and a link in the chain of evidence to establish a custom existing among dry-goods jobbers as to the time for which they were to be understood as employing clerks, when nothing was said in regard to it. The question of the reasonableness of the custom was not involved in the offer."<sup>1</sup> And a custom under which journeymen and employees are required to work for their employers a certain number of hours a day, and are allowed the privilege of working for themselves at other times, is not unreasonable.<sup>2</sup> But the usage must be a reasonable one; and for lacking this requisite to the validity of a custom, a custom that a person employed to cut staves from another's bolts has a right to take and appropriate to his own use both the clippings and corner-pieces and the culls, without the consent of the owner, has been adjudged invalid.<sup>3</sup> A usage on the part of business establishments to furnish each other's clerks with goods and charge them to each other, has been recognized in Michigan.<sup>4</sup>

As to the effect of custom on the term of the employment, see the leading case of *Holcroft v. Barber*.<sup>5</sup>

§ 135. As to the proper Performance of a Service. — And usage may be properly shown in order to settle a question as to the proper performance of the duties of a particular service.<sup>6</sup> Therefore, where the plaintiffs, who were booksellers, employed the defendant, a printer, to print for them an edition of one thousand copies of a book called "Taylor's Holy Living," but the latter printed fifteen hundred copies, delivering them one thousand and disposing of the remainder to his own use, it was held, in an action brought by them for damage caused by the market being thus overstocked, that it was a proper subject of testimony to show that, according to the usage among printers and booksellers, a printer contracting to print for a bookseller a certain number of copies of any work is not at liberty to print from the same type, while standing, an extra number for his own disposal.<sup>7</sup> So, also, it is competent to prove a custom that the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction.<sup>8</sup> So, in Texas it might be shown, before the abolition of slavery, that on a contract of hiring of a slave to do ordinary and customary labor, the slave may be employed in cleaning out a well.<sup>9</sup>

In *Reade v. Sweetzer*,<sup>10</sup> Charles Reade, the English novelist, having brought an action of libel against the publisher of a weekly newspaper in New York, called the *Round Table*, for charging him with dishonorable practices in allowing his name to be given to the publications of others, evidence was offered and admitted which went to show, on the testimony of literary men, that it was a

<sup>1</sup> In a recent Illinois case, a custom among wholesale merchants in Chicago was set up allowing their salesmen pay for time lost by sickness. But the court held it not sufficiently proved. *Sweet v. Leach*, 6 Bradw. 212.

<sup>2</sup> *Barnes v. Ingalls*, 59 Ala. 193.

<sup>3</sup> *Wadley v. Davis*, 63 Barb. 501.

<sup>4</sup> *Cameron v. Blackman*, 39 Mich. 106.

<sup>5</sup> 1 Car. & Kir. 4, ante, p. 175; *Baxter v. Nurse*, 1 Car. & Kir. 10; 6 Man. & G. 935.

<sup>6</sup> *Vaughn v. Gardner*, 7 B. Mon. 326; *Hunt v. Carlisle*, 1 Gray, 257; *Martin v. Hilton*, 9 Metc. 371; *Hunt v. Mickey*, 12 Metc. 349.

<sup>7</sup> *Williams v. Gilman*, 3 Me. 276.

<sup>8</sup> *Wilson v. Bauman*, 80 Ill. 493.

<sup>9</sup> *Willis v. Harris*, 26 Texas, 139.

<sup>10</sup> 6 Abb. Pr. (N. S.) 9.



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common custom for authors having a book to write to employ others to aid them in compiling it, and that such fact being known would not damage their reputation.

§ 136. **As to Wages and Compensation.**—Usage may regulate an employee's wages.<sup>1</sup> Thus, the mode of paying the crews of vessels,<sup>2</sup> the proper charges of a veterinary surgeon,<sup>3</sup> and the right of a local agent employed to sell glass-wire in a certain territory to claim commissions both upon goods ordered directly through him and upon goods ordered by buyers living in the territory of the agent, directly from the manufacturer,<sup>4</sup> have been shown by evidence of custom. So, if there be any general custom in a particular business under which payment becomes due weekly, monthly, or otherwise, the parties will be presumed to have contracted with reference thereto, and payment must be made in accordance therewith;<sup>5</sup> and so on the question of the proper charges of physicians, lawyers, and mechanics, evidence of usage is admissible.<sup>6</sup> The proper criterion in the assessment of a *quantum meruit* is the usual and reasonable price which others have received for similar services.<sup>7</sup>

In *Gillett v. Mawman*,<sup>8</sup> the plaintiff was a printer, and sought to recover for printing for the defendant a translation of the travels of Anacharsis. The work, it appeared, was nearly completed, when a fire accidentally broke out on the plaintiff's premises, and the whole impression was consumed. The defendant contended that the work was not completed, and showed that under these circumstances, according to the custom of the trade, the plaintiff was not entitled to be paid for any part of the printing. Said Lord MANSEFIELD, C. J.: "The custom of the trade was very fully established. It was proved that the printer, by the general usage, was not entitled to be paid for any part of his work until the whole was completed and delivered. This custom is the law of the trade, and, as far as it extends, it controls the general law." In *Keebley v. Cummins*,<sup>9</sup> the defendant's children entered the plaintiff's school, and remained there one quarter and a few days over, when they left. The defendant offered to pay for the time the children were actually at school, but the plaintiff demanded pay for the quarter, claiming it by custom, to prove which witnesses were introduced. He was held entitled to recover, HUGEN, J., saying: "The custom has long prevailed in this State of charging by the quarter, and I do not recollect any instance of its having been contested. The custom is a reasonable one, and ought to be supported." In *Thomas v. O'Hara*,<sup>10</sup> the plaintiff was the proprietor of a newspaper, and sued for his charges for the insertion of an advertisement therein a certain number of times. When the advertisement was sent to the office, the

<sup>1</sup> *Sewell v. Corp.*, 1 Car. & P. 392.

<sup>2</sup> *Eldridge v. Smith*, 13 Allen, 140. But not if unreasonable. *Metcalf v. Weld*, 14 Gray, 210.

<sup>3</sup> *Sewell v. Corp.*, *supra*.

<sup>4</sup> *Lyon v. George*, 44 Md. 295.

<sup>5</sup> *Thayer v. Wadsworth*, 19 Pick. 349; *Dodge v. Favor*, 15 Gray, 82. And see *Hunt v. Oils Co.*, 4 Mete. 404; *Naylor v. Fall River Iron-Works*, 118 Mass. 317; *Baxter v. Nurse*, 6 Man. & G. 935; 1 Car. & Kir. 10; *Fairman v. Oakford*, 5 Hurl. & N. 635; *Cutter v. Pow-*

*ell*, 2 Smith's Ld. Cas. 21; *Gray v. Murray*, 3 Johns. Ch. 167.

<sup>6</sup> *Parsell v. McQueen*, 9 Ala. 380; *Hayes v. Moynihan*, 60 Ill. 409; *Ewing v. Beauchamp*, 4 Bibb, 496; *Johnson v. De Peyster*, 50 N. Y. 466.

<sup>7</sup> *Murray v. Ware*, 1 Bibb, 325. But see *Sennett v. Pierce*, 1 Mart. (N. S.) 192.

<sup>8</sup> 1 Taun. 138.

<sup>9</sup> Harp. 268.

<sup>10</sup> 1 Mill Const. 303.



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order to insert it was general, without directions as to the time when it should be discontinued. The plaintiff admitted a part of the demand, but contended that the advertisement should have been sooner discontinued. In reply, the plaintiff offered to show that it was the usage of the business to insert all advertisements which were not accompanied by special instructions, until an express order was received to discontinue them; but the trial court excluded the evidence. This, on appeal, was held to be error. Where the parties disagreed as to the price to be paid for hauling lumber, evidence was admitted to show the usual and common price at that time and place for similar services; also, evidence of the amount paid to one or more individuals for drawing the same kind of lumber over the same route at the same time.<sup>1</sup>

A custom among builders that one-third of the stipulated price for building a house is payable when it is covered in, one-third when the floors are laid, and one-third when all the carpenter-work is completed,<sup>2</sup> is admissible to alter the rule of law that under an entire contract for the building of a house, which is destroyed by fire before its completion, the workman can recover nothing.<sup>3</sup> Evidence of a usage to receive natives temporarily on board vessels on the coast of Africa, and to leave them at convenient ports in the course of the voyage, paying them at the discretion of the master, is admissible to determine the extent of the liability of the owner of a vessel when sued for wages by a native employed on board the vessel.<sup>4</sup> A usage that the master is liable for his apprentice's board while he is sick, is valid.<sup>5</sup>

§ 137. **Contract not wholly performed — Quantum Meruit.** — In *Cutter v. Powell*,<sup>6</sup> where it was held that where a sailor was hired for a full voyage, and died before the end thereof, no wages could be claimed either on the contract or on a *quantum meruit*, it was said by LAWRENCE, J.: "If the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage." It is clear, therefore, and so it has been repeatedly laid down, that a court may infer, or the jury may find from the general and known practice and usage in such cases, that though a contract for personal service is entire, yet the compensation is payable by instalments, or is due as earned, at stated periods.<sup>7</sup>

## VII. PARTNERSHIP.

§ 138. **Powers of Partners may depend on Custom.** — It is a general principle in the law of partnership that one partner may bind the firm by any act or contract that comes within the ordinary scope of the partnership business;<sup>8</sup> and

<sup>1</sup> Swain v. Cheney, 41 N. H. 232.

<sup>2</sup> Partridge v. Forsyth, 29 Ala. 200.

<sup>3</sup> Partridge v. Forsyth, *supra*; Drake v. Goree, 22 Ala. 409; Brumby v. Smith, 3 Ala. 123.

<sup>4</sup> Sunday v. Gordon, Blatchf. & H. Adm. 569.

<sup>5</sup> Emmons v. Lord, 18 Me. 351.

<sup>6</sup> 6 Term Rep. 320; 2 Smith's Ld. Cas. 17.

<sup>7</sup> Cunningham v. Morrill, 10 Johns. 203, and cases cited; 2 Smith's Ld. Cas. 17-51. Consequently the ruling in *Petty v. Gale*, 25 Ala. 473, that evidence of a usage to pay *pro rata* on contracts of hire where a servant fails to work the full time agreed on, even if proved, could not be recognized, is bad law.

<sup>8</sup> Cox v. Hickman, 8 H. L. Cas. 288; Haw-

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this implied authority cannot, as to third parties without notice, be limited even by the articles of agreement.<sup>1</sup> But the necessity that the authority, to be valid, must be exercised within the ordinary business and transactions of the firm, renders the question of usage an important one in arriving at the liabilities of the partnership in any case. "Thus, for example," says Judge Story,<sup>2</sup> "in cases of factorage, it is a common, though not an invariable usage, to guaranty the solvency of the purchasers on sales made by the factor, and to receive therefor a commission *del credere*; and this would be deemed an authority within the scope of a partnership formed for factorage purposes, although it could not be shown that the partners had stipulated for that power in their articles of partnership, or, even if they had excluded it by such articles, if it was unknown to the principal for whom they were dealing."<sup>3</sup> So, it is the common course of business for persons engaged in the purchase and sale of horses to give a warranty on sales made by them; and, therefore, a warranty made in the course of such business by one partner would bind the partnership, notwithstanding the articles prohibited such warranty, if the purchaser were unacquainted therewith. On the other hand, where it is not the common course of the business in which a partnership is engaged, to give letters of guaranty or of credit, if one partner should give such a letter of guaranty or credit, it would not be binding on the firm, although given in the name thereof.<sup>4</sup> For the like reason, if one partner should, in the name of the firm, make purchases of goods not connected with the known business of the firm, such purchases would not bind the partnership. Thus, for example, if a partnership is engaged in the mere business of selling dry goods by wholesale or retail, unconnected with navigation, a purchase of a ship by one partner in the name of the firm would not be binding on the other partners unless they should assent thereto. So, if persons are engaged in the mere business of tallow-chandlers as partners, a purchase of a cargo of flour, or of pepper, or of coffee, or of other things, by one partner, wholly beside the business of the firm, would not bind the other partners. But if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor was not acquainted with the facts. The real difficulty, in many cases of this sort, is to ascertain what contracts, engagements, and acts are properly to be deemed within the scope of the particular partnership trade or business; for these are not exactly the same in all sorts of

ken v. Bourne, 8 Mee. & W. 703; Eastman v. Clark, 53 N. H. 276; Campbell v. Dent, 54 Mo. 325; Fox v. Clifton, 6 Bing. 792; Walden v. Sherburne, 15 Johns. 422; Van Keuren v. Parmelee, 2 N. Y. 525; Winship v. Bank of the United States, 5 Pet. 581; Greeley v. Wyeth, 10 N. H. 16; Kenney v. Altwater, 77 Pa. St. 34; Blodgett v. Weed, 119 Mass. 215; Pahlman v. Taylor, 75 Ill. 629; Deckell v. Howell, 42 Cal. 636; First National Bank v. Carpenter, 41 Iowa, 518.

<sup>1</sup> United States Bank v. Binney, 5 Mason,

176; 5 Pet. 529; Davis v. Richardson, 45 Miss. 499; Hayward v. French, 12 Gray, 453; Sterling v. Jaudon, 48 Barb. 459; Mechanics' Bank v. Foster, 44 Barb. 87.

<sup>2</sup> Story on Part., §§ 111-113.

<sup>3</sup> Sandilands v. Marsh, 2 Barn. & Ald. 673; Hope v. Cust, 1 East, 53; Ex parte Nolte, 2 Glyn & J. 295.

<sup>4</sup> Hope v. Cust, 1 East, 53; Duncan v. Lowndes, 3 Camp. 478; Hasleham v. Yocum, 5 Q. B. 833; Brette v. Williams, 4 Exch. 253 (overruling Ex parte Gardon, 15 Ves. 286).

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trade or business.<sup>1</sup> On the contrary, in many cases, rights, powers, and authorities over the partnership property and partnership concerns exist either by usage, or by general understanding, or by natural implication, which are wholly unknown in others. To answer the inquiry, then, satisfactorily, it is not enough to show that in other trades or other business, certain rights, powers, and authorities are incident thereto, and may be lawfully exercised by each of the partners; but we must see that they appropriately belong to, or are by usage or otherwise implied or incidental to the particular trade or business in which the partnership is engaged."<sup>2</sup>

In *Galloway v. Hughes*,<sup>3</sup> where a member of a partnership engaged in transporting cotton by boats from the upper country to Charleston, contracted to sell as well as to carry a certain lot, and also to bring back the proceeds, it was held that the firm was liable upon the contract, it being shown that it was the usage among boatmen on the river to undertake the sale of cotton when requested to do so, as an incident of the carriage and as a means of procuring freight. The principles applicable to the case before the court were clearly, but somewhat oddly, stated by JOHNSON, J. "There is no limitation or restraint," said he, "upon the associations of men for proper and legitimate purposes. They may be extended to all the pursuits of industry and enterprise, and they may be limited to the catching and selling of oysters. And in every association the partners are liable for the acts of each other, exactly so far as they are necessary to the object of the partnership, and no further. Two men unite their stock in merchandise, and agree to share the profit and loss. If one purchase goods on account of the concern the other is liable, because that is directly in the pursuit of the object of their association; but if one should take upon himself to build a castle, and to fortify and man it, there would be no reason or justice in subjecting the other to the expenditure incurred by it. He is not bound, because he did not assent to it. Supposing the facts to exist which this question assumes, the inquiry then would be whether the obligation to sell cotton carried on freight is implied in the obligation to carry; for in that event alone would the partners be liable for a defalcation of one in the sale. If I were to answer this inquiry without reference to the usage in regard to it, I should unhesitatingly pronounce that it did not. The capacity to manage a boat and to strike a good bargain are not necessarily identified. In the one, physical strength is in some degree indispensable; in the other, a knowledge of trade is required. One who handles an oar or a pole with dexterity might find himself overmatched in a market. Or if I were to judge of this matter from my own observation, I should come to the same conclusion. The sale of produce, it is true, is sometimes confided to a boatman, but this is rare. Most of the planters confide that matter to factors or agents residing in town. But this question can only be resolved by usage.

\* \* \* The terms used to designate the objects of the partnership between the defendants are general, and express no more than an association to carry on the

<sup>1</sup> London, etc., *Soc. v. Hagerstown*, etc., Bank, 36 Pa. St. 498; *Thompson v. Franks*, 37 Pa. St. 327; *Livingston v. Pittsburg*, etc., R. Co., 2 Grant Cas. 219; *Maltby v. Railroad Co.*, 16 Md. 422; *Cadwallader v. Kroesen*, 22 Md. 200; *Freeman v. Carpenter*, 17 Wis. 126.

<sup>2</sup> *Dickinson v. Valpy*, 10 Barn. & Cress. 128; *Brettel v. Williams*, 4 Ex. Ch. 623; *Hawthorne v. Bourne*, 7 Mee. & W. 505; *Ex parte Chippendale*, 4 De G. M. & G. 19.

<sup>3</sup> 1 Bailey, 553.

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trade of boating on the river on their joint account and for their joint benefit; and their leading object was doubtless the profit to be derived from freights. They imply, however, and necessarily, all the incidents to the leading object. To earn freight, boats properly manned, provisioned, and equipped are indispensable; and hence the obligation of the partners to share the cost of the boat, the hire of hands, provisions, etc.; and it is upon the faith of this joint liability that one partner obtains credit for the firm. These things fall so directly within the objects of the partnership that no one would question their joint liability. But in the mixed and multifarious transactions of men it is sometimes difficult, in a particular transaction, to determine whether it belongs to the actor in his individual or partnership character, and in the solution of this difficulty I know of no rule so certain, practical, and safe as the common opinion and usage of those most conversant with the business." This case is much like *Waring v. Grady*,<sup>1</sup> with which all the adjudications on the subject are in accord.<sup>2</sup>

§ 139. **Usages as to Name of Firm.**—Where the partnership has not adopted a composite name, the fact that they did business in the individual name of one partner may be shown by usage.<sup>3</sup>

§ 140. **Common Report cannot prove a Partnership.**—Though it was held in a few early cases in New York that a partnership might be proved by evidence of general reputation,<sup>4</sup> these decisions were subsequently overruled; and it is now settled, both in that and other States, that evidence that it was the common understanding in the locality that a partnership existed, is not sufficient proof of such relation.<sup>5</sup> Were this otherwise, a person of doubtful credit might circulate the report that another was in partnership with him, for the purpose of maintaining his credit; or his creditors might spread the report, in order to make their debt more secure.<sup>7</sup> It may be added that neither is evidence of reputation admissible to prove the dissolution of a partnership.<sup>8</sup>

In *Foye v. Leighton*,<sup>9</sup> two defendants were sued for the value of labor and services rendered by the plaintiff, and on the trial they introduced evidence showing the manner in which the business was carried on in the brick-yard

<sup>1</sup> *Ante*, p. 173.

<sup>2</sup> *Etheridge v. Binney*, 9 Pick. 272; *Boardman v. Gore*, 15 Mass. 331; *Smith v. Collins*, 115 Mass. 388; *Cayton v. Hardy*, 27 Mo. 536. As to the usage of masters of whaling-vessels entering into partnership in their catches, and as to usages of the whaling business generally, see *Baxter v. Rodman*, 3 Pick. 435; *Thompson v. Hamilton*, 12 Pick. 425; *Aberdeen Co. v. Sutter*, 2 Pat. Sec. App. 1106; *Fennings v. Lord Grenville*, 1 Taun. 241. As to the usages of the whaling trade, where the compensation is generally a share in the catchings, see *Swift v. Gifford*, 2 Lowell, 110; *Smith v. Lawrence*, 26 Conn. 476; *Rich v. Ryder*, 105 Mass. 306; *Shaw v. Mitchell*, 2 Mete. 65.

<sup>3</sup> *Le Roy v. Johnson*, 2 Pet. 200; *Ontario Bank v. Hennessey*, 48 N.Y. 515.

<sup>4</sup> *Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 Johns. 176; *McPherson v. Rathbone*, 11 Wend. 96. And see *Allen v. Rostain*, 11 Serg. & R. 373.

<sup>5</sup> See *Halliday v. McDougall*, 20 Wend. 81.

<sup>6</sup> *Bryden v. Taylor*, 2 Har. & J. 336; *Brown v. Crandall*, 11 Conn. 92; *Goddard v. Pratt*, 16 Pick. 412; *Pitcher v. Barrows*, 17 Pick. 391; *Hicks v. Cram*, 17 Vt. 419; *Carlton v. Ludlow Woollen Mills*, 27 Vt. 496; *Grafton Bank v. Moore*, 13 N. H. 99; *Carter v. Douglass*, 2 Ala. 500; *Campbell v. Hastings*, 29 Ark. 512; *Scott v. Blood*, 16 Me. 192; *Souclair v. Wood*, 3 Cal. 98; *Lockridge v. Wilson*, 7 Mo. 560; *Bowen v. Rutherford*, 60 Ill. 41.

<sup>7</sup> *Brown v. Crandall*, 11 Conn. 92.

<sup>8</sup> *Goddard v. Pratt*, 16 Pick. 412.

<sup>9</sup> 22 N. H. 71.

## Partners Bound by Usage.

in which the plaintiff labored, as tending to show that their interests in the yard and business were entirely separate. The defendants then offered to show, which offer the court permitted, that the same method of conducting business was adopted in other yards of similar extent, where the business was carried on by one person, or jointly by two or more persons. But the Supreme Court considered that this latter proof was wrongly admitted. "This," said EASTMAN, J., "we cannot regard as having any tendency to establish a custom or usage by which individuals in this kind of business are to be judged in partnership. It shows the manner in which the business is done, — that it is carried on in the same way, whether more or less are engaged in it, — but it can have no tendency to fix the existing contracts between the parties transacting the business, any further than it shall apply to the yard in regard to which the evidence is given."

Evidence of usage may, however, be of value in establishing a partnership as to third persons. As between themselves, the partners can only be considered as such, and a partnership, in fact, can only exist where there is a voluntary agreement entered into for that purpose; and there can be no such thing as a partnership *inter se* against the intention of the parties to the contract.<sup>1</sup>

§ 141. But Usage may be controlling as to Third Persons. — As to third persons, parties may be liable as partners in two ways — by being partners in fact, as between themselves, or by holding themselves out to the public as such. In the first case the relationship and the liability are apparent and plain, while in the second the law does not permit them to deny the relation to the prejudice of third parties, and, on the principle of estoppel, they are held to the same liabilities to those who have acted on the belief of the partnership as if such a

<sup>1</sup> Marquand v. New York Man. Co., 17 Johns. 525; Howell v. Harvey, 5 Ark. 270; Porter v. McClure, 15 Wend. 187; Bocklen v. Hardenbergh, 60 N. Y. 8; Loomis v. Marshall, 12 Conn. 70; Leggett v. Hyde, 58 N. Y. 272; Hedge's Appeal, 63 Pa. St. 273; Kingman v. Spurr, 7 Pick. 235; Channel v. Fassitt, 16 Ohio, 166; Freeman v. Bloomfield, 43 Mo. 331; Bishop v. Georgeason, 60 Ill. 181; Green v. Beesley, 2 Bing. N. C. 103; Wilson v. Whitehead, 10 Me. & W. 503; Emanuel v. Draughn, 14 Ala. 303; Barrett v. Swan, 17 Mo. 180; French v. Styring, 2 C. B. (8. s.) 357; Halstead v. Schmelzel, 17 Johns. 80; Brown v. Tapscott, 6 Me. & W. 119; Quine v. Quine, 9 Smed. & M. 155; Griffith v. Buffum, 22 Vt. 181; Goule v. Hayward, 1 Cal. 345; Smith v. Wright, 5 Sandf. 113; Gilpin v. Enderby, 5 Barn. & Ald. 954; Muzzy v. Whitney, 10 Johns. 226; Salter v. Ham, 31 N. Y. 321; Gill v. Kuhn, 6 Serg. & R. 337; Kerr v. Potter, 6 Gill, 404; Rawlinson v. Clarke, 15 Me. & W. 292; Stocker v. Broekbank, 3 Man. & G. 250; Wilkinson v. Frazier, 4 Esp. 182; Mair v. Glennie, 4 Man. & Sel. 210; Geddes v. Wallace, 2 Bli. 270;

Hesketh v. Blanchard, 4 East, 141; Gibson v. Lupton, 9 Bagn. 237; Goode v. McArthurney, 10 Texas, 191; Ross v. Dinkler, 2 Hill, 415; Allen v. Dunn, 15 Me. 231; Price v. Alexander, 2 G. Greene, 427; McArthur v. Laird, 5 Ohio, 431; Bailey v. Clark, 6 Pick. 372; Barnett v. Smith, 17 Ill. 565; Drake v. Rainey, 3 Rich. L. 37; Ogden v. Astor, 4 Sandf. 311; Nutting v. Colt, 3 Hal-t. Ch. 539; Motley v. Jones, 3 Ired. L. 44; Kellogg v. Griswold, 12 Vt. 291; Newman v. Bean, 1 Fost. 93; Stearns v. Haven, 16 Vt. 87; Mason v. Potter, 26 Vt. 722; McCauley v. Cleveland, 21 Miss. 438; Moore v. Smith, 19 Ala. 774; Olmstead v. Hill, 2 Ark. 346; Taylor v. Perkins, 26 Wend. 124; Norment v. Hull, 1 Humph. 320; Hawes v. Tillinghast, 1 Gray, 239; Chase v. Barrett, 4 Page, 148; Potter v. Moses, 1 R. I. 430; Wilkinson v. Jett, 7 Leigh, 15; Lowry v. Brooks, 2 McCord, 421; Bull v. Schuberth, 2 Md. 38; Winship v. Bank of the United States, 5 Pet. 529; Randle v. The State, 49 Ala. 14; Hazard v. Hazard, 1 Story, 371; Lamb v. Grover, 47 Barb. 317; Lintner v. Millican, 47 Ill. 178; Newman v. Bean, 21 N. H. 93.

## Principal and Agent.

relation had been actual.<sup>1</sup> It is in this last class of cases that evidence is competent to show such a "holding out" by the party sought to be charged as to estop him from denying his liability.

Thus, in *Gill v. Kuhn*,<sup>2</sup> the firm of Gill, Canonge & Co. entered into a contract with one Peter Kuhn, an auctioneer, in which it was agreed between all the parties to follow their several occupations together in the same establishment, but without any copartnership, which it was expressly agreed should not exist. It being shown that it was their practice to issue bills of lading and give receipts containing their names jointly, and to issue circular letters signed, "Peter Kuhn & Son, auctioneers; Gill, Canonge & Co., commission merchants," it was considered, in the Supreme Court of Pennsylvania, that as to third persons they had undoubtedly made themselves responsible as partners.<sup>3</sup> So, a habit of advertising<sup>4</sup> or making out bills<sup>5</sup> in the joint name, or distributing handbills in which the name of the defendant appeared as a partner,<sup>6</sup> or marking merchandise with a firm-name,<sup>7</sup> or executing contracts or conveyances jointly,<sup>8</sup> may be shown in evidence for this purpose.<sup>9</sup>

## VIII. PRINCIPAL AND AGENT.

§ 142. Agency must be executed in Accordance with Usage.—If it is the usage of a place that a mercantile agency should be executed in a particular way, the parties who authorize and agree to exercise this agency impliedly incorporate this usage into their contract.<sup>10</sup> Thus, a broker cannot bind his prin-

<sup>1</sup> *Fox v. Clifton*, 6 Bing. 776; *Dickinson v. Valpy*, 10 Barn. & Cress. 128; *Goode v. Harrison*, 5 Barn. & Ald. 147; *Spencer v. Billing*, 3 Camp. 310; *Ex parte Watson*, 19 Ves. 459; *Parker v. Barker*, 1 Brod. & B. 9; *Bond v. Pittard*, 3 Mee. & W. 357; *Bonfield v. Smith*, 12 Mee. & W. 405; *Wagh v. Carver*, 2 H. Black. 235; *Hoare v. Dawes*, 1 Doug. 371; *Young v. Axtell*, 2 H. Black. 242; *Ex parte Langdale*, 2 Rose, 444; *Melver v. Humble*, 16 East, 169; *Martyn v. Gray*, 14 C. B. (N. S.) 824; *Edmonson v. Thompson*, 2 Fost. & Fin. 564; *Palmer v. Pinkham*, 33 Me. 32; *Bowen v. Rutherford*, 60 Ill. 41; *Reber v. Machine Co.*, 12 Ohio St. 175; *Gumbel v. Abrams*, 20 La. An. 568; *Drennen v. House*, 41 Pa. St. 30; *Dutton v. Woodman*, 9 Cush. 255; *Field v. Tenney*, 47 N. H. 513; *Wood v. Pennell*, 51 Me. 52; *Bowie v. Maddox*, 29 Ga. 285; *Sherrod v. Langdon*, 21 Iowa, 518; *Post v. Kimberly*, 9 Johns. 470; *Potter v. Greene*, 9 Gray, 309; *Rice v. Barrett*, 116 Mass. 314; *Cushing v. Smith*, 43 Texas, 261; *In re Jewett*, 15 Nat. Bank. Reg. 126.

<sup>2</sup> 6 Serg. & R. 333.

<sup>3</sup> And see *Benedict v. Davis*, 2 McLean, 348.

<sup>4</sup> *Ex parte Matthews*, 3 Ves. & Bea. 125.

<sup>5</sup> *Young v. Axtell*, 2 H. Black. 242; *McNamara v. Dratt*, 33 Iowa, 385.

<sup>6</sup> *Tumlin v. Goldsmith*, 40 Ga. 221; *Walcott v. Canfield*, 3 Conn. 195.

<sup>7</sup> *Penn v. Kearney*, 21 La. An. 21.

<sup>8</sup> *Crowell v. Western Reserve Bank*, 3 Ohio St. 406. And see *Conklin v. Barton*, 43 Barb. 435.

<sup>9</sup> And see *Bennett v. Holmes*, 32 Ind. 108; *Cragin v. Carleton*, 21 Me. 493; *Hall v. Lanning*, 91 U. S. 160. So, where the issue is whether a certain house is a hotel, the custom of its proprietors to so advertise it is relevant. *Stringer v. Davis*, 35 Cal. 25.

<sup>10</sup> *Whart. on Ag.*, § 134; *Young v. Cole*, 3 Bing. N. C. 724; *Sutton v. Tatham*, 10 Ad. & E. 27; *Bayliffe v. Butterworth*, 1 Exch. 445; *Graves v. Legg*, 2 Hurl. & N. 210; *Pickering v. Buck*, 15 East, 38; *Brady v. Todd*, 9 C. B. (N. S.) 592; *Frank v. Jenkins*, 22 Ohio St. 577; *Schuchardt v. Allen*, 1 Wall. 359; *Greely v. Bartlett*, 1 Greenl. 172; *Randall v. Kehlor*, 60 Me. 37; *Goodenow v. Tyler*, 7 Mass. 36; *Upton v. Suffolk Mills*, 4 Cush. 586; *Day v. Holmes*, 103 Mass. 306; *Willard v. Buckingham*, 36 Conn. 335; *Daylight-Burner Gas Co. v. Odlin*, 51 N. H. 56; *McKinstry v. Pearsall*, 3 Johns. 319; *Smith v. Tracy*, 36 N. Y. 79; *Rosenstock v. Tormey*, 32 Md. 163; *American Central Ins. Co. v. McLanathan*, 11 Kan. 533. And see *Russell v. Hankey*, 6 Term Rep. 12; *Belcher v. Parsons*, Amb. 219; *Caffrey v. Darby*, 6 Ves. 496; *Massey v. Banner*, 1 Jac. & W. 241.



## Usage as to Execution of Agency.

principal except in the manner recognized by the custom of the trade. In a Pennsylvania case, S. gave orders to R., in the employ of W., a broker in Pittsburg, to buy five hundred barrels of oil; the order was telegraphed to W.'s house in Philadelphia, who telegraphed in reply: "We have bought, subject to immediate confirmation, 500 barrels." R., not knowing the seller's name, immediately replied: "We hereby confirm purchase," signing S.'s name, but not having had any further communication with S. On the next day R. received the seller's name and sent it to S., who, not being satisfied with his standing, refused him, and refused to sign a contract or accept the oil. It was proved that the custom of oil dealers was that the seller's name must be submitted to the principal for confirmation, and that when names were given and rejected the sale failed. The court held that there was no evidence of a contract on which the seller could recover from S.; that the broker could not bind his principal except in the manner recognized by the custom; and that R.'s confirmation was without authority.<sup>1</sup> *Hodgson v. Davies*,<sup>2</sup> tried before Lord ELLENBOROUGH in 1810, was an action for not delivering tobacco sold by the defendant to the plaintiff by bill, through the medium of a broker. The defence relied upon was that the defendant had not ratified the contract entered into by the broker. On the 7th of July, 1808, the broker wrote out the bought-and-sold note, and sent a copy to each of them. The defendant made no objection till five days after, when he was called upon to deliver the tobacco, then saying that he was not satisfied with the sufficiency of the purchaser, and refusing to perform the contract. The defendant's counsel contended that the person who sold goods by a broker reserved to himself the power of ratifying or rejecting the contract, as he should be satisfied with the credit of the purchaser, and offered to prove that such was the usage of trade in the city of London. Lord ELLENBOROUGH was at first inclined to think that the contract concluded by the broker must be absolute unless his authority was limited by writing, of which the purchaser had notice, but the special jury found that unless the name of the purchaser had been previously communicated to the seller, if the payment was to be by bill, the seller was always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser and annulling the contract. Lord ELLENBOROUGH then ruled that the usage was reasonable and valid. But he clearly thought that the rejection should be intimated as soon as the seller had had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigency of commerce would permit. He left it to the jury to say whether it was according to usual commercial practice to reject a contract so long after it had been entered into. The jury considered that five days was too long, and found for the plaintiff. And it seems that if an agent conducts his business according to the usages of the trade he will be exonerated from all responsibility, even if it could be shown that by a deviation from them he might have acted more beneficially for his principal.<sup>3</sup> And as to the incidental powers of agents, it may be stated, generally, that they result from the particular business, employment, or character of the agents themselves. "Whatever acts,"

<sup>1</sup> *Sumner v. Stewart*, 69 Pa. St. 321.

<sup>2</sup> 2 Camp. 530.

<sup>3</sup> Story on Ag., § 96; *Moore v. Mourgue*, Cowp. 480; *Smith v. Cologan*, 2 Term Rep.

188, note a; *Warwicke v. Noakes*, Peake N. P. 68; *Russell v. Hankey*, 6 Term Rep. 12; *Belcher v. Parsons*, Amb. 219.



## Principal and Agent.

says STORY,<sup>1</sup> "are usually done by such classes of agents, whatever rights are usually exercised by them, and whatever duties are usually attached to them, all such acts, rights, and duties are deemed to be incidents of the authority confided to them in their particular business, employment, or character. These, indeed, are in some cases so well known and so well defined in the common negotiations of commerce and by the frequent recognition of courts of justice, as to become matters of legal intendment and inference, and not to be open for inquiry or controversy. In other cases, indeed, they may be fairly open matters of fact, to be established by suitable proofs." Mr. WHARTON states the rule very concisely thus: "Each particular kind of brokerage must take its type from the usages of the business with which it deals. A. wants to sell cotton, for instance, and B. wants to buy cotton, and C. is the broker through whom the one buys and the other purchases. But how? As will presently be seen, the contract is reduced to a few words, representing a transaction which rests upon the usage of the particular business, and that usage would be part of the contract, should that contract be written out in full. It is not written out in full, being only the notes of a contract incorporating this usage. Hence it is that when the contract to which the broker binds the parties is under investigation, it is admissible, in order to show what the contract was, to prove a usage of the particular business, so far as this usage is fair and reasonable."<sup>2</sup>

§ 143. **Authority of Agent.**—Authority given to a general agent cannot be limited by secret instructions so as to affect third parties dealing with him. But what his authority really is, and the limits of that authority in special cases, will be found to depend in no small degree upon the custom of the trade he follows, or of the place in which his business is transacted. Many cases recognize this principle,<sup>4</sup> whose application will be better seen in the next few sections.

The authority of an agent to sign and indorse negotiable paper may be inferred, even where no express authority existed, from the usage of the agent to make such paper with the knowledge and assent of the principal.<sup>5</sup> But authority to sign as maker or surety cannot be inferred from a general usage to indorse.<sup>6</sup>

<sup>1</sup> Story on Ag., § 106.

<sup>2</sup> Whart. on Ag., § 696. And see *Rapp v. Grayson*, 2 Blackf. 130; *Sumner v. Stewart*, 69 Pa. St. 321; *Kraft v. Fancher*, 44 Md. 204; *Colket v. Ellis*, 10 Phila. 375.

<sup>3</sup> *McCombie v. Davies*, 6 East, 528; *Patterson v. Tash*, 2 Stra. 1178; *Pickering v. Bush*, 15 East, 38; *Allen v. Ogden*, 1 Wash. C. Ct. 174; *Bryant v. Moore*, 26 Me. 84; *Fitzharrisons v. Joslin*, 21 Vt. 129; *Minter v. Pacific R. Co.*, 41 Mo. 503; *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 290; *Fitzherbert v. Mather*, 1 Term Rep. 12; *Johnson v. Jones*, 4 Barb. 369; *Whitehead v. Tuckett*, 15 East, 400; *Fenn v. Harrison*, 3 Term Rep. 757.

<sup>4</sup> *Whitehead v. Tuckett*, 15 East, 400; *Baines v. Ewing*, L. R. 1 Exch. 320; *Dickinson v. Lilwall*, 4 Camp. 279; *Hammond v. Varian*, 54 N. Y. 398; *Green v. Disbrow*, 7 Lans. 381; 56 N. Y. 336; *Brown v. Arnott*, 6

*Watts & S.* 402; *Fay v. Richmond*, 43 Vt. 23; *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Nobleboro v. Clark*, 68 Me. 87; *Haven v. Wentworth*, 2 N. H. 93; *Morris v. Bowen*, 52 N. H. 416; *Anderson v. Kneeland*, 6 Cow. 354; *The Hendrik Hudson*, 7 Law Rep. (N. S.) 93; *Wilcocks v. Phillips*, 1 Wall. jr. 47; *McMorris v. Simpson*, 21 Wend. 610; *Easton v. Clark*, 35 N. Y. 232; *White v. Fuller*, 67 Barb. 267; *Bucknam v. Chaplin*, 1 Allen, 70; *Goldsmith v. Mannheim*, 109 Mass. 187; *Greenfield Bank v. Crafts*, 2 Allen, 269; *Corbett v. Underwood*, 83 Ill. 321; *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Oldershaw v. Knoles*, 4 Bradw. 63; s. c. 6 Bradw. 325; *Rich v. Johnson*, 61 Ill. 246; *Wallace v. Bradshaw*, 6 Dana, 382.

<sup>5</sup> *Moore v. Bank of the Metropolis*, 13 Pet. 302; *True v. True*, 33 Me. 367.

<sup>6</sup> *Early v. Reed*, 6 Hill, 12.

## Usages of the Stock Exchange.

A general selling-agent cannot bind his principals by a warranty that flour sold by him for them will keep sweet during a sea-voyage, no usage to that effect being proved.<sup>1</sup> Authority to remit to his principal by bill,<sup>2</sup> and for clerks of steamboats to sign negotiable paper for the necessary expenses,<sup>3</sup> may be shown by evidence of custom; and the usage of mercantile houses may be proved to show that a clerk had no authority to make certain contracts.<sup>4</sup> So, a substitute-broker may be shown, by the custom of the occupation, to warrant that the persons offered by him are not defaulters.<sup>5</sup> But a general usage among horse-dealers not to warrant under certain circumstances cannot be set up to defeat a warranty by a servant having an implied authority so to do.<sup>6</sup>

§ 144. **Usages of the Stock Exchange.**—The rule that the parties are presumed to agree that a mercantile agency shall be exercised according to the usages of the trade, is supported by many cases which have arisen on the English Stock Exchange. A few instances will suffice. A., a stock-broker, sold for B. four bonds, and paid him the amount; the bonds were afterwards discovered to be worthless, whereupon A. took them back without notice to B., and reimbursed the purchaser. The custom of the Stock Exchange permitting this, A. was allowed to recover the amount from B.<sup>7</sup> Again: A. authorized B. to sell for him twenty railway-shares. B. sold them to C., another broker. The shares not being delivered on that day, C. bought twenty other shares at the market price, and claimed the difference between the contract price and the market price. B. paid him the difference, and brought an action for money paid, to recover this sum. It was proved to be the usage among brokers to be responsible to each other upon these contracts, and B. was therefore held liable.<sup>8</sup> Again: A., a broker and member of the Stock Exchange, on August 28, 1856, at the request of B., bought for him twenty shares of bank stock, to be paid for on the "settlement day," which was on September 15th, and duly forwarded him the usual broker's contract note. The bank stopped payment on September 3d, and ultimately became bankrupt. On the 11th B. repudiated the transaction, and gave A. notice not to pay the price on his account. A. having been compelled, according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent B. the certificates and transfers, and upon his declining to accept them, sued him for the money, and it was decided that he was entitled to recover.<sup>9</sup> Again: B., a London merchant, employed A., a broker in Liverpool, to purchase some wool. A. negotiated a sale by C. to A. of certain bales, deliverable at Odessa, "the name of the vesse" to be declared as soon as the wools were shipped." In this transaction A. acted for both B. and C. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. It was held in

<sup>1</sup> *Upton v. Suffolk County Mills*, 11 Cush.

687; *Wiltshire v. Sims*, 1 Camp. 258.

<sup>2</sup> *Potter v. Morland*, 3 Cush. 384.

<sup>3</sup> *Mott v. Hall*, 41 Ga. 117.

<sup>4</sup> *Jones v. Warner*, 11 Conn. 40.

<sup>5</sup> *Lebanon v. Heath*, 47 N. H. 353.

<sup>6</sup> *Howard v. Sheward*, L. R. 2 C. P. 148.

<sup>7</sup> *Young v. Cole*, 3 Bing. N. C. 724; *Child v. Morley*, 8 Term Rep. 610.

<sup>8</sup> *Bayliffe v. Butterworth*, 1 Exch. 426.

<sup>9</sup> *Taylor v. Stray*, 2 C. B. (N. S.) 175. And see *Sutton v. Tatham*, 10 Ad. & E. 27; *Smith v. Lindo*, 5 C. B. (N. S.) 587; *Stray v. Russell*, 20 L. J. (Q. B.) 279; *Lloyd v. Gilbert*, 25 L. J. (Q. B.) 74.

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this case, both in the Court of Exchequer and the Exchequer Chamber, that B. was bound by the usage, and that a notice by C. to A. of the names of the vessels on which the wools were shipped was a performance of that stipulation, although A. omitted to communicate them to C.<sup>1</sup> Again: A. employed B., a broker, to sell two hundred and fifty shares in a company. On the day after receiving the authority B. sold one hundred and nine shares, and on the following day one hundred more. On the latter day, but after the sale, A. told B. that he had made a mistake, and intended to sell only fifty shares, and was told that the sales could not be avoided. A. left the matter in B.'s hands, to do the best he could. By the usages of the Stock Exchange, if, upon a sale of this description, the vendor was not prepared to complete his contract, the purchaser might buy the requisite number of shares, and the vendor was bound to make up the loss, if any. The purchaser in this case having bought at a loss, B. paid the difference, and then sued A. in *assumpsit* for money paid. He was allowed to recover.<sup>2</sup> These cases, and others cited below, show the law to be well settled that when a contract for the purchase or sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or sellers, of jobbers, members of the Stock Exchange, the lawful usages and rules of the Stock Exchange are incorporated into and become part and parcel of all such contracts, and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages.<sup>3</sup>

§ 145. *Delegation of Agent's Authority.*—The maxim, *Delegata potestas non potest delegari*, expresses an important principle in the law of agency.<sup>4</sup> One who has authority from another to do an act must execute it himself, and cannot delegate his authority to another; for, being a confidence or trust reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him

<sup>1</sup> Greaves v. Legg, 11 Exch. 642; 2 Hurl. & N. 210.

<sup>2</sup> Sutton v. Tatham, 10 Ad. & E. 27.

<sup>3</sup> Evans on Ag., chap. 2, § 2; Robinson v. Mollett, L. R. 7 H. L. 802; Maxted v. Paine, L. R. 4 Exch. 210; Taylor v. Stray, 2 C. B. (N. S.) 175; Smith v. Lindo, 5 C. B. (N. S.) 587; Pidgeon v. Burslem, 3 Exch. 465; Rosewarne v. Billing, 15 C. B. (N. S.) 316; Jessopp v. Lutyche, 10 Exch. 614; Knight v. Chambers, 15 C. B. 562; Beeston v. Beeston, 1 Exch. Div. 13; Bowring v. Shepherd, L. R. 6 Q. B. 309; Grissell v. Bristowe, L. R. 4 C. B. 36; Coles v. Bristowe, L. R. 4 Ch. 3; Duncan v. Hill, L. R. 6 Exch. 255; L. R. 8 Exch. 242.

<sup>4</sup> Burial Board v. Thompson, L. R. 6 C. P. 457; Baker v. Cave, 1 Hurl. & N. 678; Alexander v. Alexander, 2 Ves. 640; Ingram v. Ingram, 2 Atk. 88; Hamilton v. Roysse, 2 Sch. & Lef. 330; Attorney-General v. Benjamin, 2 Ves. 643; Hawkins v. Kemp, 3 East, 410; Cole v. Wade, 16 Ves. 27; Howes v. Ball, 7 Barn. & Cress. 481; Cockran v. Irlam, 2 Mau. & Sel.

301; Doe v. Robinson, 3 Bing. N. C. 677; Catlin v. Bell, 4 Camp. 183; Walsh v. Southworth, 6 Exch. 156; Wilson v. Thorpe, 6 Mees. & W. 721; Little v. Newton, 2 Scott N. R. 509; Great Northern R. Co. v. Eastern Counties R. Co., 6 El. & Bl. 327; Warner v. Martin, 11 How. 209; Boccock v. Pavey, 8 Ohio St. 270; Gillis v. Bailey, 1 Fost. 149; Hawley v. James, 5 Paige, 323; Locke's Appeal, 72 Pa. St. 491; Lyon v. Jerome, 26 Wend. 485; Emerson v. Providence Hat Co., 12 Mass. 241; Ex parte Winsor, 8 Story, 411; Smith v. Sublett, 28 Texas, 163; Bissell v. Roden, 34 Mo. 63; Loomis v. Simpson, 13 Iowa, 532. "A factor cannot delegate his employment to another so as to raise a privity between that other and his principal." Solly v. Rathbone, 2 Mau. & Sel. 299; Cockran v. Irlam, 2 Mau. & Sel. 301. The reason of the rule is, that it is a trust and confidence reposed in the ability and integrity of the person authorized. Warner v. Martin, 11 How. 209.

## Sales on Credit.

for such a purpose.<sup>1</sup> To the general rule that power given to one person to do an act cannot be delegated to another, there are many exceptions;<sup>2</sup> but it is important here to note only that usage may change a case which otherwise would be governed by this maxim. In one case, it is true, it was remarked by Lord ELDON that "the doctrine is very dangerous, indeed, that if an auctioneer is authorized to sell, all his clerks, when he goes out of town, are, in consequence of any usage in that business, agents for the person who authorized him."<sup>3</sup> But in *Moon v. Guardians of the Poor*,<sup>4</sup> a custom, in the case of an architect, to employ a surveyor to make out the quantities of a building proposed to be erected was held valid, so as to render the employers of the builder liable to the surveyor for his work. "The jury found," said TINDAL, C. J., "that there was a usage in the trade for architects or builders to have their quantities made out by surveyors. \* \* \* It appeared that the custom is beneficial to the parties concerned; that if builders are not assisted by surveyors they send in tenders which lead to loss and inconvenience from a mistake in the quantities." BOSANQUET, J., said: "The jury must be taken to have found that what has been done was done consistently with the usage of the trade. It has been contended that architects are employed only to draw plans, and not to make out quantities, but the defendants knew that the quantities were to be made out by somebody, and that if the work proceeded the surveyor was to be paid by the successful competitor; and the jury have said that the architect, in employing a surveyor, acted according to the usage of the trade." Similarly, in *Gray v. Murray*,<sup>5</sup> Chancellor KENT allowed a supercargo to recover for services performed by subordinates appointed by him on account of his sickness, the decision being expressly placed on the usage of the trade in such cases. In a subsequent Alabama case, the court, while deciding, on the facts in the case, that the delegation was unauthorized and not binding, admitted that the custom of the trade might, if proved, have changed the result.<sup>6</sup> But it has been held in Indiana that a local custom authorizing a factor, in his discretion, without the assent or knowledge of his principal, to ship goods intrusted to him for sale in his own market, to a factor of his own choosing, unknown to his principal, at his principal's risk, and in case of loss without any responsibility on himself, is unreasonable and void.<sup>7</sup>

§ 146. **Power to sell on Credit.**—It was laid down by Lord Chief Justice HOLT in *Rex v. Lee*,<sup>8</sup> decided in 1701, that "every factor, of common right, is to sell for ready money." Mr. WHARTON states it as the general rule of law that a factor must sell for cash;<sup>9</sup> and Chancellor KENT has expressed himself to this

<sup>1</sup> Johnson v. Cunningham, 1 Ala. 249.

<sup>2</sup> Howard v. Bailie, 2 H. Black. 618; Barnett v. Lambert, 15 Me. & W. 489; Quebec, etc., R. Co. v. Quinn, 12 Moo. P. C. C. 265; Howard's Case, L. R. 1 Ch. 561; Totterdell v. Fareham Brick Co., L. R. 1 C. P. 674; Smith v. Butcher, 1 Car. & Kir. 573; Trueman v. Loder, 11 Ad. & E. 589; Laussatt v. Lippincott, 6 Serg. & R. 386; Gray v. Murray, 3 Johns. Ch. 167; Bodine v. Insurance Co., 51 N. Y. 117; Buckland v. Conway, 16 Mass. 396; Dorchester, etc., Bank v. New England Bank,

1 Cush. 177; Williams v. Woods, 16 Md. 220; Commercial Bank v. Norton, 1 Ill. 501.

<sup>3</sup> Coles v. Trecothick, 9 Ves. 250.

<sup>4</sup> 3 Bing. N. C. 814.

<sup>5</sup> 3 Johns. Ch. 167.

<sup>6</sup> Johnson v. Cunningham, 1 Ala. 249. And see Darling v. Stanwood, 14 Allen, 504.

<sup>7</sup> Wallace v. Morgan, 23 Ind. 399.

<sup>8</sup> 12 Modern, 514.

<sup>9</sup> Whart. on Ag., § 740; 2 Kent's Comm. 622.

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effect most unequivocally. It is perhaps more correct to say, with STORY,<sup>1</sup> that the right of a factor to sell upon credit, although formerly a fact to be ascertained by usage, is now treated as an undeniable principle of law, and incidental to the agency, in the absence of all contradictory proofs.<sup>2</sup> In *Goodenow v. Tyler*,<sup>3</sup> a custom in Boston, where the sale was effected, for factors to sell on credit at the risk of their principals, unless an additional premium was allowed for taking the risk upon themselves, was recognized; and one who, having goods consigned to him, sold on three months' credit, taking in payment the purchaser's promissory note to himself, and the purchaser afterwards became insolvent, was held not liable for the value of the goods.<sup>4</sup>

§ 147 **Power to pledge Goods.** — That a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of a doubt. "Though a factor," says Chancellor KENT, "may sell and bind his principal, he cannot pledge the goods as a security for his own debt. The principal may recover the goods of the pawnee, and his ignorance that the factor held the goods in the character of an agent is no excuse."<sup>5</sup> The rule, in the absence of a contrary statute, seems to be as well settled a rule as any in the books, supported as it is by the text-writers and by a host of adjudications both in this country and in England.<sup>7</sup> But Judge STORY, after unqualifiedly laying down the rule as before stated, adds that he may pledge the goods of a principal for all charges and purposes "which are allowed or justified by the usage of trade."<sup>8</sup> And Mr. WHARTON says:<sup>9</sup> "Yet, even while professing to accept this principle, — i.e., that the factor cannot pledge, — the courts, feeling its inconvenience, were ready to modify it by compelling it to yield to local usage." There are cases in the books in accordance with these views, but they are few. Lord ELDON, in *Pultney v. Keymer*,<sup>10</sup> was apparently inclined to this mode of avoiding the strictness of the common-law rule; but *Pultney v. Keymer* has since then been both criticised and expressly overruled.<sup>11</sup> Had such a usage been shown in *Graham v. Dyster*,<sup>12</sup> decided by Lord ELLENBOROUGH in 1816, the liability of the factor

<sup>1</sup> Story on Ag., § 209.

<sup>2</sup> *Goodenow v. Tyler*, 7 Mass. 36; 5 Am. Dec. 22; *Allen v. Vanderpool*, 6 Johns. 69; 5 Am. Dec. 160; *Forrestier v. Bordman*, 1 Story, 43; *Emery v. Gerbier*, 2 Wash. C. Ct. 413; *James v. McCredie*, 1 Bay, 297; *Burrill v. Phillips*, 1 Gall. 360; *Greely v. Bartlett*, 1 Greenl. 172; *Houghton v. Matthews*, 3 Bos. & Pul. 489; *Lench v. Beardslee*, 22 Conn. 404; *Harbert v. Neil*, 49 Texas, 143; *Neill v. Billingsley*, 49 Texas, 161; *Dwight v. Whitney*, 16 Pick. 179.

<sup>3</sup> 7 Mass. 36; 5 Am. Dec. 22; *ante*, p. 180.

<sup>4</sup> And see *Chandler v. Hogle*, 58 Ill. 43; *Rich v. Munroe*, 14 Barb. 602; *Johnston v. Osborne*, 11 Ad. & E. 549.

<sup>5</sup> *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Warner v. Martin*, 11 How. 229; *Patterson v. Tash*, 2 Stra. 1178; *Macus v. Henderson*, 1 East, 337; *Newson v. Thornton*, 6 East, 17; *McJombie v. Davies*, 6 East, 538; *Daubigny*

*v. Duval*, 5 Term Rep. 604; *Guichard v. Morgan*, 4 J. B. Moo. 36.

<sup>6</sup> 2 Kent's Comm. 626.

<sup>7</sup> Story on Ag., § 113; Whart. on Ag., § 552; *Boyson v. Coles*, 6 Mau. & Sel. 14; *Rodriguez v. Heffernan*, 5 Johns. Ch. 423; *Benny v. Rhodes*, 18 Mo. 147; *Kelly v. Smith*, 1 Blatchf. 290; *Evans v. Potter*, 2 Gall. 13; *Van Amringe v. Peabody*, 1 Mason, 440; *Michigan State Bank v. Gardner*, 15 Gray, 362; *Mackay v. Dillinger*, 73 Pa. St. 85; *Kinder v. Shaw*, 2 Mass. 398; *Bowie v. Napier*, 1 McCord, 1.

<sup>8</sup> Story on Ag., § 113.

<sup>9</sup> Whart. on Ag., § 552.

<sup>10</sup> 3 Esp. 182.

<sup>11</sup> See *Solly v. Rathbone*, 2 Mau. & Sel. 298; *Cockran v. Irlam*, 2 Mau. & Sel. 301, note; *Shipley v. Kymer*, 1 Mau. & Sel. 484; *Martin v. Coles*, 1 Mau. & Sel. 140; *Queroz v. Truman*, 3 Barn. & Cress. 342; *Boyson v. Coles*, 6 Mau. & Sel. 14.

<sup>12</sup> 2 Stark. N. P. 21.

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might have been different, though such a conclusion is not certain, the opinion being far from clear upon this point. The case of *Neibold v. Wright*,<sup>1</sup> which in 1833 came before the Supreme Court of Pennsylvania, is often cited as an instance of a usage of trade changing the law as to a factor's power to pledge. The opinions in that case are very lengthy, but the syllabus to the report reads thus: "A usage cannot be set up in opposition to a general rule of law; therefore, a usage for factors to pledge the goods of their principals is bad." And FOGGERS, J., who delivered the opinion of the court, said of the custom set up at the trial: "It would be of pernicious consequence to the commercial world to recognize such a custom so proved, made for the benefit of a few, opposed as it is to the general mercantile law. It is an attempt to set up a custom in opposition to a general principle of law, which cannot be permitted." It may be observed, however, that one judge dissented from the rest of the court, and apparently favored the admission of the custom. But in *Laussatt v. Lippicott*,<sup>2</sup> where one to whom goods were delivered by his principal to sell, deliver, and receive payment, deposited them with a commission merchant connected in business with a licensed auctioneer, who advanced his notes thereon, it was held that this transaction bound the principal, the jury having found that this was in accordance with the usage of the trade. TILGHMAN, C. J., admitted the general rule of law to be against the defendant, saying: "That a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of a doubt."<sup>3</sup> But he added: "Now, the jury have found that in the ordinary course of business in this city, merchandise-brokers make sale of the goods of the principal in the manner in which this coffee was sold. Therefore, when the plaintiff trusted a well-known merchandise-broker with the possession of his goods for the purpose of sale, he impliedly gave him power to sell in the manner in which he sold; or, to speak with more strict propriety (though the jury call it a sale), the manner in which he deposited for the purpose of sale." This case was cited to the court in *Neibold v. Wright*, but without changing the decision of the court upon the main question.

§ 148. **Insurance of Goods in Hands of Agent.**—An agent is bound to insure the goods of his principal, not only where he has agreed to,<sup>4</sup> and where the established rules of law require him to do so,<sup>5</sup> but likewise where the general usage of trade requires it.<sup>6</sup>

§ 149. **Payment to Agent.**—A payment of money due to the principal, made to an agent duly authorized to receive it, is a payment to the principal, and will

<sup>1</sup> 4 Rawle, 195.

<sup>2</sup> 6 Serg. & R. 389.

<sup>3</sup> Citing *Patterson v. Tash*, 2 Stra. 117; *Wright v. Campbell*, 4 Burr. 2046; *Pickering v. Busk*, 15 East, 43.

<sup>4</sup> Story on Ag., § 190; *Tickel v. Scott*, 2 Ves. 239; *White v. Madison*, 26 N. Y. 117.

<sup>5</sup> *Smith v. Lascelles*, 2 Term Rep. 189; *Berthoud v. Gordon*, 6 La. 579; *Morris v. Summerl*, 2 Wash. C. Ct. 203; *Wallace v. Telfair*, 2 Term Rep. 183; *French v. Reid*, 6 Binn. 308; *De Tastet v. Croussat*, 2 Wash. C. Ct. 132.

<sup>6</sup> Story on Ag., § 190; *Kingston v. Wilson*, 4 Wash. C. Ct. 15; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 114; *Crosbie v. McDoual*, 13 Ves. 138; *Randolph v. Ware*, 3 Cranch, 503; *Thorne v. Deas*, 4 Johns. 101; *Crawford v. Hunter*, 8 Term Rep. 13; *French v. Backhouse*, 5 Burr. 2727; *Columbus Ins. Co. v. Lawrence*, 2 Pet. 49; *Lee v. Adsit*, 37 N. Y. 87; *Tongee v. Kennett*, 10 La. An. 800; *Collings v. Hope*, 3 Wash. C. Ct. 149; *Walsh v. Frank*, 19 Ark. 270.



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discharge the debt.<sup>1</sup> But one employed to sell for a known principal has not, from that fact alone, authority to receive payment, and the law does not raise such a presumption to protect an innocent payment to such an agent.<sup>2</sup> It has been held in New York that where an agent has not, by the established rules of law, an implied authority to receive payment, such an authority cannot be shown by a local usage allowing such an agent to receive payment for his principal.<sup>3</sup>

On the other hand, in respect to a debt due in the ordinary course of business, a payment made to one found in the creditor's office, and apparently intrusted with the conduct of the business, will bind the person to whom it is due. "If it did not," said Lord TENTERDEN, C. J., "the consequences would be very serious. In a great place of business like this, [London] no transactions could be carried on if it were not sufficient for a purchaser to send his money to the seller's place of business, and pay it to any person whom he finds there, whether actually authorized to receive it or not, who appears to be intrusted with the conduct of the business. The debtor has the right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority."<sup>4</sup> Payment of a debt being only good in money, the usage of attorneys for collection to receive in depreciated bills of a State bank debts due their clients is contrary to law, and inadmissible.<sup>5</sup>

§ 150. **Payment—Set-off.**—The factor, unless authorized by his principal, cannot set off his private debt to the vendee against the vendee's debt on the sale; and the principal will not be bound by such a transaction.<sup>6</sup> An agent employed to receive a debt must take payment only in money.<sup>7</sup> Nevertheless, it has been ruled in several cases that where a broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps

<sup>1</sup> Favenc v. Bennett, 11 East, 38; Baring v. Corrie, 2 Barn. & Ald. 137; Goodland v. Blewith, 1 Camp. 477; Coates v. Lewes, 1 Camp. 444; Barrett v. Deere, Moo. & M. 200; Henry v. Marvin, 3 E. D. Smith, 71; Renard v. Turner, 42 Ala. 117; Capel v. Thornton, 3 Car. & P. 352; Pickering v. Busk, 15 East, 38; Cross v. Haskins, 13 Vt. 536; Hackney v. Jones, 3 Humph. 612; Pinckney v. Hagadorn, 1 Duer, 89.

<sup>2</sup> Baring v. Corrie, 2 Barn. & Ald. 138; Ireland v. Thomson, 4 C. B. 149; Mynn v. Jolliffe, 1 Moo. & R. 326; Morris v. Cleasby, 1 Mau. & Sel. 576; Whiton v. Spring, 74 N. Y. 169.

<sup>3</sup> Higgins v. Moore, 34 N. Y. 417 (reversing s. c. 6 Bosw. 341). As to evidence of usage to pay an agent, see Heisch v. Carrington, 5 Car. & P. 471.

<sup>4</sup> Barrett v. Deere, Moo. & M. 200; Wilmot v. Smith, Moo. & M. 238; Hudson v. Johnson, 1 Wash. 10; Branch v. Burnley, 1 Call, 147.

<sup>5</sup> West v. Ball, 12 Ala. 340.

<sup>6</sup> Whart. on Ag., § 741; Westwood v. Bell, 4 Camp. 349; Turner v. Thomas, L. R. 6 C. P. 610; Dresser v. Norwood, 17 C. P. (N. S.) 496; Miller v. Lea, 35 Md. 396; Lime Rock Bank v. Plimpton, 17 Pick. 159; Guy v. Oakley, 13 Johns. 332; Stewart v. Aberdeen, 4 Mee. & W. 221; 2 Kent's Comm. 622; Underwood v. Nichols, 17 C. B. 239; Sweeting v. Pearce, 7 C. B. (N. S.) 449; s. c. 9 C. B. (N. S.) 534; Warner v. Martin, 11 How. 209; Benny v. Pegram, 18 Mo. 191; Beach v. Forsyth, 14 Barb. 499; Bartlett v. Pentland, 10 Barn. & Cress. 700; Scott v. Irving, 1 Barn. & Adol. 605.

<sup>7</sup> Barker v. Greenwood, 2 You. & Coll. 418; Bostick v. Hardy, 30 Ga. 830; Greenwood v. Burns, 50 Mo. 52; Mangum v. Ball, 43 Miss. 288; Catterall v. Hindle, L. R. 1 C. P. 186; s. c. 2 C. P. 368.



## Usage as to Agent's Compensation.

running accounts, and not merely with money actually received, the rule laid down in the foregoing cases cannot properly be applied, but it must be understood that where an account is *bona fide* settled according to that known usage, the original debtor is discharged and the agent becomes the debtor.<sup>1</sup> In Massachusetts it is recognized that in the usual and ordinary course of business a factor does not, and is not required to keep the money received upon the sale of goods of different consignors in separate and distinct parcels, but mingles all in a common mass, and with the like funds of his own, from whatever source derived.<sup>2</sup>

A custom among stock-brokers to appropriate money belonging to their principal to the payment of his broker's indebtedness is illegal. In *Evans v. Waln*, Waln employed Markoe, a broker in Philadelphia, to sell stock. Evans, a broker in New York, sold the stock by order of Wister, another Philadelphia broker under Markoe, with the assent of Waln, without naming the owner; but before the proceeds were remitted by Evans, Wister failed, in debt to Evans. It was held, in the Supreme Court of Pennsylvania, that Evans could not retain the debt from the proceeds, and that evidence that it was the custom of brokers, in their dealings with brokers of other cities, to put all transactions between them into one account and settle for the general balance, was not admissible. "If there is a custom among stock-brokers," said WILLIAMS, J., "when dealing with others, to appropriate money belonging to the principal to the payment of his broker's indebtedness, the sooner it is abolished the better. *Malus usus abolendus est*. A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defence to this action." So, it has been held that a usage among factors to mix in one parcel the goods of different consignors, and, upon a sale of the same, to charge the purchaser with the same, and in some cases to take negotiable notes therefor and negotiate the same as their own property, and in case of the failure of the purchaser, to charge the consignor with the debt as a bad debt, would not prevent a recovery by a consignor who could trace his goods, or the proceeds thereof, into the hands of the factor or his trustee.<sup>5</sup>

§ 151. *The Agent's Compensation.*—There being no express contract as to the agent's compensation, usage may settle the amount,<sup>6</sup> though it was early remarked by the courts that in many cases a special contract was better, as not leaving the matter open to doubt and speculation.<sup>7</sup> A commission merchant's charges may be shown to be reasonable, and not usurious, by proof of the

<sup>1</sup> *Stewart v. Aberdeen*, 4 Mee. & W. 211; *Catterall v. Hindle*, L. R. 2 C. P. 304; *Sweetling v. Pearce*, 9 C. B. (N. S.) 534; *Warner v. Martin*, 11 How. 209; *Scott v. Irving*, 1 Barn. & Adol. 605.

<sup>2</sup> *Vail v. Durant*, 7 Allen, 409.

<sup>3</sup> 71 Pa. St. 69.

<sup>4</sup> See also *Farmer's, etc., National Bank v. Sprague*, 52 N. Y. 605.

<sup>5</sup> *Chesterfield Man. Co. v. Dehon*, 5 Pick. 7; 16 Am. Dec. 307.

<sup>6</sup> *Eicke v. Meyer*, 3 Camp. 412; *Cohen v. Fager*, 4 Camp. 96; *Stewart v. Kohle*, 3

*Stark*, N. P. 361; *Auriol v. Thomas*, 2 Term Rep. 62; *Read v. Rann*, 10 Barn. & Cres. 438; *Baynes v. Fry*, 15 Ves. 120; *Kuhlman v. Brown*, 4 Pick. 479; *Power v. Kane*, 5 Wis. 265; *Barnard v. Adams*, 10 How. 270; *Dyer v. Sutherland*, 75 Ill. 580; *Beale v. Creswell*, 3 Md. 190; *Morgan v. Mason*, 4 E. D. Smith 636; *Saydam v. Westfall*, 4 Hill, 211; *Hartje v. Collins*, 46 Pa. St. 268; *Edwards v. Goldsmith*, 16 Pa. St. 43; *Inslee v. Jones*, Bright, 76.

<sup>7</sup> *Roberts v. Jackson*, 2 Stark. N. P. 735.

## Principal and Agent.

custom of the trade;<sup>1</sup> and a usage for the master of a vessel to have the freight on money carried, as his own, and to be personally liable on such contracts, is valid.<sup>2</sup>

Although, as a general rule, an agent on a paid salary cannot recover an additional compensation for extra work done by him,<sup>3</sup> still, when a custom exists to the contrary, such an allowance may be made;<sup>4</sup> that is, if the party claiming it can bring himself within the custom; thus, A., claiming the usual commissions of a broker, must show that he is a broker, and the like.<sup>5</sup> But where there is an express agreement between principal and agent, specifying the conditions upon which commissions are to be allowed, it is not competent to show a usage allowing commissions when these conditions are not complied with;<sup>6</sup> and where the question was whether the compensation claimed by the directors of a corporation was reasonable, evidence of a custom in a number of other corporations not to pay salaries or other compensation to directors for services was rejected. In *Rowcliffe v. Leigh*,<sup>7</sup> a horse-dealer brought a claim against the estate of a testator for charges connected with the purchase and sale of horses for the testator, and for the keep of horses for several years. The executrix disputed the amount charged, and alleged that the claimant had sold several horses, as agent for the testator, on commission. The horse-dealer replied that he had never sold horses on commission as agent for the testator, but simply on the terms that he should pay the testator a fixed sum for each horse, and sell it again on his own account for what he pleased, retaining the difference, if any, as his profit. It was held that evidence that this was the custom of all horse-dealers of good standing was admissible in support of his claim.

§ 152. *The Agent's Compensation, continued*—The Rules of Law as to, cannot be overturned by Usage.—There are two rules of law concerning the agent's compensation which are well established. The first is, that profits made by an agent out of the principal's property belong to the principal and not to the agent;<sup>8</sup> the second is, that an agent of the owner to sell property cannot be an agent for the purchaser as well, and receive pay from both.<sup>9</sup>

<sup>1</sup> *Brown v. Harrison*, 17 Ala. 774.

<sup>2</sup> *Halsey v. Brown*, 3 Day, 346.

<sup>3</sup> *Marshall v. Parsons*, 9 Car. & P. 656; *Moreau v. Dumagenc*, 20 La. An. 230.

<sup>4</sup> *Ibid.*; *United States v. McDaniel*, 7 Pet. 1; *United States v. Fillebrown*, 7 Pet. 28.

<sup>5</sup> *Erben v. Lorillard*, 2 Keyes, 567; *Lyon v. Valentine*, 33 Barb. 271.

<sup>6</sup> *Main v. Eagle*, 1 E. D. Smith, 619.

<sup>7</sup> *Central Bridge Co. v. City of Lowell*, 15 Gray, 106.

<sup>8</sup> *In re Leigh's Estate*, L. R. 6 Ch. Div. 256.

<sup>9</sup> *East India Co. v. Henchman*, 1 Ves. jr. 289; *Massey v. Davis*, 2 Ves. jr. 317; *Williamson v. Barbour*, 37 L. T. (N. S.) 698; *Morrison v. Thompson*, L. R. 9 Q. B. 483; *Barber v. Dennis*, 6 Modern, 69; Anonymous, 12 Modern, 415; *Rogers v. Boehm*, 2 Esp. 702; *Franklin v. Firth*, 3 Bro. C. C. 433; *Traverse v. Townsend*, 1 Bro. C. C. 334; *Thomson v. Havelock*, 1 Camp. 627; *Diplock v. Black-*

*burn*, 3 Camp. 43; *Turnbull v. Garden*, 38 L. J. (Ch.) 331; *Kimber v. Barber*, L. R. 8 Ch. 56; *Prevost v. Gratz*, 1 Pet. C. Ct. 364; *Robinson v. Robinson*, 1 De G. M. & G. 253; *Campbell v. Insurance Co.*, 2 Whart. 64; *Bartholomew v. Leech*, 7 Watts, 472; *Norris' Appeal*, 71 Pa. St. 106; *Oliver v. Pratt*, 3 How. 333; *Wiley's Appeal*, 8 Watts & S. 241; *Ackenburgh v. McCool*, 36 Ind. 473; *Lafferty v. Jelley*, 22 Ind. 471; *Marvin v. Buchanan*, 62 Barb. 165; *Bain v. Brown*, 7 Lans. 508; *Dutton v. Wilner*, 52 N. Y. 313; *Leake v. Sutherland*, 25 Ark. 219; *Rhea v. Puryear*, 26 Ark. 314; *White v. Ward*, 26 Ark. 445; *Barton v. Moses*, 32 Ill. 50; *Mason v. Bauman*, 62 Ill. 76; *Ely v. Hanford*, 65 Ill. 267; *Denson v. Stewart*, 15 La. An. 456; *Clark v. Anderson*, 10 Bush, 91.

<sup>10</sup> Except he be a middle-man, acting for both parties with the knowledge and consent of both. *Everhart v. Searle*, 71 Pa. St. 256; *Rice v. Wood*, 113 Mass. 133; *Lloyd v. Col-*

## Illegal Usages.

Both these rules the courts have refused to allow to be changed by proof of a contrary custom. In *Diplock v. Blackburn*,<sup>1</sup> the question was whether the defendant had a right to the sum of £134 under the following circumstances: The plaintiffs were the executors of the captain of a ship, of which the defendant was the owner, and it appeared that when at the Cape of Good Hope the captain had occasion to draw a bill upon England, on account of the ship, for the sum of £1,500, and on account of the exchange at the time he received as premium the sum of £134. The counsel for the plaintiffs contended that this money belonged to the testator, and offered to call witnesses to prove that it was usual for the captain of a ship, in such cases, to be allowed for his own benefit any advantage arising from the state of the exchange. But Lord ELLENBOROUGH ordered a nonsuit, saying: "I am clearly of opinion that this premium belonged to the owner, and not to the captain. If a contrary usage has prevailed, it has been a usage of fraud and plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty. I believe that in this very way servants of the public abroad have been guilty of enormous peculations. The testator was undoubtedly bound to debit himself for the £134 as much as for any other sum of money he received on the defendant's account." So, in a New York case it was held that a custom among insurance agents that they are entitled to all dividends declared by mutual companies, in lieu of other compensation, for effecting the insurance, was bad. "No custom," said the court, "can be established which contravenes a well-settled principle of law. It has been the settled doctrine of the courts, both of law and equity, for centuries, that an agent cannot appropriate to his own use any portion of the profits arising from the business of his principal. The custom proposed to be established overrides this rule of law, and authorizes the agent not to appropriate to himself a part only, but the whole of the profits arising from the business of his principal. Such a custom needs only to be stated to be repudiated. If tolerated, it would lead to the grossest abuses. Insurance-brokers would be induced to become members of mutual insurance companies; all property intrusted to them would be insured in these companies, not infrequently without regard to expense, or even the responsibility of the company, so that it should exist long enough to enable them to dispose of the dividends which might be awarded to them. The rights of all the parties are best secured by requiring the broker to charge such commissions as he may be fairly entitled to, and permitting the customer to take whatever profits may be earned in the course of the business."<sup>2</sup>

In the case of *Raisin v. Clark*,<sup>3</sup> a usage of real-estate brokers in the city of Baltimore to act for both parties in an exchange of real estate, and to charge a

ston, 5 Bush, 587; *Scribner v. Collar*, 40 Mich. 378; 8 Cent. L. J. 205; *Kerfoot v. Hyman*, 52 Ill. 512; *Rapp v. Sampson*, 16 Gray, 398; *Walker v. Osgood*, 98 Mass. 348; *Lynch v. Fallon*, 11 R. I. 311; *Lazarus v. Bryson*, 3 Binn. 54; *Ex parte Bennett*, 10 Ves. 381; *Schwartz v. Yearly*, 31 Md. 270; *Pugsley v. Murray*, 4 E. D. Smith, 245.

<sup>1</sup> 3 Camp. 43.

<sup>2</sup> *Minnesota Central R. Co. v. Morgan*, 52

Barb. 217. See the English cases of the *Great-Western R. Co. v. Cunliffe*, L. R. 9 Ch. 525, and *Baring v. Stanton*, L. R. 3 Ch. Div. 502. Of these cases it must be observed that it was the principal's acquiescence, and not the agent's custom, which prevailed with the court. And see *Brown v. Litton*, 1 P. Wins 140; *Jacques v. Edgell*, 40 Mo. 76.

<sup>3</sup> 41 Md. 158, post, Chap. V.

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commission to both, was held void. A similar custom among the brokers of Boston was treated in the same way in *Farnsworth v. Hemmer*,<sup>1</sup> decided by the Supreme Judicial Court of Massachusetts in 1861, BIGELOW, C. J., saying: "The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them.<sup>2</sup> Such being the well-settled rule of law, it follows that the evidence offered by the plaintiff was inadmissible. A custom or usage, to be legal and valid, must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfillment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents."<sup>3</sup>

Where A. had agreed to pay B. "twenty per cent upon all original or first-year premiums collected and paid in by him," B. was not permitted to show that, by the usage of the business, premiums were treated as "collected and paid in" although, for the convenience of the assured, they were payable in subsequent instalments.<sup>4</sup> And a custom, when goods are consigned to merchants for

<sup>1</sup> 1 Allen, 494.

<sup>2</sup> Story on Ag., § 31; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 108; *Pugsley v. Murray*.

<sup>4</sup> E. D. Smith, 245; *Rapp v. Sampson*, 10 Gray, 101.

<sup>3</sup> *Kimball v. Brawner*, 47 Mo. 398. And see *Partridge v. Insurance Co.*, 15 Wall. 2; *Stagg v. Insurance Co.*, 10 Wall. 500; *Park v. Piedmont, etc., Ins. Co.*, 43 Ga. 611.

## Disregard of Instructions not Excused by Usage.

sale, and again consigned by them to others to sell, for each house to charge a commission of two and a half per cent, the usual commission for selling goods, is void as against common reason and justice.<sup>1</sup> And so is a custom of factors to charge both commissions and interest on advances.<sup>2</sup> But a well-established custom among life-insurance companies and their agents as to the kind and extent of property the agents may possess in the lists of policies they procure, is admissible to explain a contract between them.<sup>3</sup> And a usage by which the seller of property is held liable to pay a commission to a broker whose services he has accepted, and who has introduced him to, and brought him into negotiation with an ultimate buyer, and who is ready to continue his services until a sale is effected, is a reasonable one, in allowing a recovery for services accepted and rendered, even though the sale is finally effected by another broker.<sup>4</sup> So, in an action on a promise to pay commissions to an insurance agent, evidence of a usage of the trade to pay commissions only on premiums actually collected is admissible.<sup>5</sup>

In one case, where the defendant, a ship-owner, was desirous of chartering a vessel, and the plaintiff, a ship-broker, introduced him to A., another broker, who introduced him to B., who made known to C. that the charter was wanted, and through the negotiations of C. with the defendant, he chartered the vessel, the plaintiff sued for commissions, alleging that the "introducing broker" was entitled by custom to a share of the commissions. The plaintiff's counsel in the case proposed to ask a witness the question, "What is the custom with regard to payment of brokers' commissions where a broker introduces another broker to a ship-owner, who subsequently negotiates with the broker introduced?" but the evidence was rejected by MARTIN, B. In the Court of Exchequer his ruling was affirmed. Said POLLOCK, C. B.: "A custom for one broker to be paid for another broker's work may be good where there is a direct communication between the introducing broker and the principals; but if a ship-owner in want of a charter applies to a broker, who gives the name of another broker, and he mentions a third broker, whom the principal employs, it is simply preposterous that the broker originally applied to should have any claim on the principal. A custom is alleged in support of it, but no usage can make such a custom good." BRAMWELL, WILDE, and MARTIN, BB., agreed that even if such a custom could be established, it would be bad.<sup>6</sup> However, in another case in the same year, in the same court, where the rights of "introducing brokers" was discussed, a custom among ship-brokers that the introducing broker should receive a commission on every renewal of a charter originally effected through him was held admissible. The principal question in this last case was whether the usage was in conflict with the terms of the contract between the parties; and of the four judges who sat, only POLLOCK, C. B., questioned its legality.<sup>7</sup>

§ 153. Usage cannot excuse a Disregard of Instructions. — A usage for a broker to act inconsistent with his relations with his principal, or to disregard his instructions, is bad. In *Day v. Holmes*,<sup>8</sup> it was held that the order of a cus-

<sup>1</sup> *Spear v. Newall*, 23 Vt. 159, *Burton v. Blin*, 21 Vt. 151.

<sup>2</sup> *Smets v. Kennedy*, Riley, 218.

<sup>3</sup> *Ensforth v. New York, etc., Ins. Co.*, 7 Am. L. Reg. 332.

<sup>4</sup> *Loud v. Hall*, 106 Mass. 46.

<sup>5</sup> *Miller v. Insurance Co.*, 1 Abb. N. C. 470.

<sup>6</sup> *Gibson v. Crick*, 1 Hurl. & C. 142.

<sup>7</sup> *Allen v. Sundius*, 1 Hurl. & C. 123.

<sup>8</sup> 103 Mass. 306.

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tomers to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, would not authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission, though a general usage among stock-brokers to act in this manner was proved. "There are many forcible objections to its validity," said the court, "but a conclusive one is that it is against sound policy and good morals. It authorizes the broker, in his discretion, to disregard his instructions, and instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into a contract of agency." In a previous case in the same court, it was said by FOSTER, J.: "It would be difficult to support a usage by which a broker employed to purchase stock might, without the knowledge of his principal, buy the stock for himself."<sup>1</sup> So, in a Maryland case it was said: "The order is given to a stock-broker to purchase certain shares of a particular stock, by parties not shown to have actual knowledge of any peculiar usage or custom of his business; and whilst the law will allow custom and usage to regulate its execution in the reasonable mode we have indicated, it will not permit the defendants, by the force of any such custom or usage, to be bound by a merely fictitious purchase — such, for instance, as one not *bona fide* and actually made, but pretended to be effected by mere entries upon books and accounts between the plaintiff and his New York agents."<sup>2</sup> In *Crupper v. Cook*,<sup>3</sup> a usage in the wool trade that when a broker is employed to buy wool, he may either contract in the name of the principal, or, at the request of the seller, may, without the consent of the principal, make himself personally responsible, was held valid and reasonable by the English Court of Common Pleas; and subsequently, on the authority of this case, the same court ruled that a broker might make himself personally responsible, as between himself and the seller, if there was a usage to warrant it. But two of the judges thought that although a usage may control the mode of performing a contract, a person employing a broker would not be bound by a usage to buy on a running account the whole amount covered by orders from different parties, and then to tender the amount covered by his order, or, if the delivery was not taken, to claim the difference.<sup>4</sup> This case was afterwards taken to the Court of Exchequer Chamber, and there the judges were again equally divided, KELLY, C. B., CHANNELL, B., and BLACKBURN, J., holding that the defendant was bound by the usage, while CLEASBY, B., and MELLOR and HANNEN, JJ., were of the contrary opinion. It was then carried to the House of Lords, where the decision of the lower court was unanimously reversed, the LORD CHANCELLOR and LORDS CHELMSFORD, HATHERLY, and O'HAGAN all agreeing. "The usage," said LORD CHELMSFORD, "is of such a peculiar character, and is so completely at variance with the relations between the parties, — converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty, — that I think no person who is ignorant of such a usage can be held to have agreed to submit to its conditions merely by employing the services of a

<sup>1</sup> Pickering v. Demeritt, 100 Mass. 306.<sup>2</sup> Rosenstock v. Torney, 32 Md. 169.<sup>3</sup> L. R. 3 C. P. 194.<sup>4</sup> Mollett v. Robinson, L. R. 5 C. P. 646.



## Usage to Disregard Instructions.

broker, to whom the usage is known, to perform the ordinary and accustomed duties belonging to such employment."<sup>1</sup> A broker intrusted with stock-certificates, with written instructions to sell under certain circumstances, cannot transfer the shares for a different purpose to either himself or another person, and a custom among brokers to do so is irrelevant.<sup>2</sup> Where an agent received of his principal the sum of \$275 "to buy flour," and the latter, receiving no flour, demanded his money, when the agent produced a receipt for \$300 from another person "towards 100 barrels of flour, at \$4 a barrel," which he wished to exchange for his own receipt, but the principal refused, it was held that the latter was entitled to recover the money; and that evidence that it was the custom among merchants going or sending to purchase goods to pay for the article purchased without taking a delivery or seeing it, this being considered a purchase, was inadmissible.<sup>3</sup>

No usage will warrant a factor in departing from the positive instructions of his principal. In an action against the defendants to recover the proceeds of certain rice consigned to them as factors, for sale, it appeared that the plaintiff's instructions to the defendants were to sell for cash, but that they sold and delivered the rice to another party without his paying for it, and that he afterwards absconded. The defendants set up a usage which had existed among factors in the place of the sale for forty years, where they sold for cash, to give indulgence of a week or a fortnight before calling for the money. CHEVES, J., thought the usage reasonable, and essential to the transaction of business in that community; but all the other judges of the Supreme Court of South Carolina were of opinion that it could not on any account excuse the departure from the instructions given. "That usage," said NORT, J., who spoke for five members of the court, "does in many instances constitute the law, and that contracts must be construed with reference to the usages of the trade or business to which they relate, are principles too well established to be questioned now. Numerous examples are to be found among the cases arising on policies of insurance; and perhaps no stronger case can be found than that of three days' grace allowed in cases of bills of exchange. But, to entitle a usage to that high respect it must be a reasonable one. It must be for the benefit of trade generally, and not for the convenience and benefit of a particular class of individuals. And I can conceive of no usage that will authorize a departure from positive instructions. The instructions of a principal to his agent make the law by which he is to be governed, and to authorize him to depart from them would be depriving the parties of the privilege of making their own terms."<sup>4</sup> Where factors in Milwaukee received a consignment of wheat, with instructions to sell for cash, and they made a sale of the wheat, taking the purchaser's check for the amount, payable the next day, and on the next day he failed and the check was dishonored they were held liable to their principal; and not the less that, by the usual course of business in Milwaukee, factors collected cash sales on the day after delivery.<sup>5</sup> So, where a commission merchant to whom cheese was consigned was directed

<sup>1</sup> Robinson v. Mollett, L. R. 5 C. P. 646; L. R. 7 C. P. 84; L. R. 7 H. L. Cas. 802. And see Bostock v. Jardine, 3 Hurl. & Colt. 700; Johnson v. Kershaw, L. R. 2 Exch. 82; Ireland v. Livingston, L. R. 5 Q. B., 516; L. R. 2 Q. B. 99; L. R. 5 H. L. Cas. 395.

<sup>2</sup> Parsons v. Martin, 11 Gray, 112.

<sup>3</sup> Strong v. Bliss, 6 Mete. 393.

<sup>4</sup> Barksdale v. Brown, 1 Nott & M. 517; 9 Am. Dec. 720.

<sup>5</sup> Hall v. Storrs, 7 Wis. 253.



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to sell it for cash, and delivered it without receiving the money, he was not protected by a custom existing among commission merchants to deliver such articles and wait for the pay a week or ten days.<sup>1</sup> So, where a person to whom goods were consigned to sell on commission, "for cash, or not on credit," sold them to one who agreed to pay for them in a few days, but failed to do so, it was held that the factor could not show in defence a custom by which such sale was considered a cash sale.<sup>2</sup> Again: in a New York case of a similar character, an offer on the part of the defendant to prove that the uniform course of the market in New York, where the cattle in question in that case were sold, "in making sales for cash," was to deliver the cattle to the purchaser, who slaughters and weighs them, and after the weight is ascertained pays for them, which occupation usually occupies two or three weeks in the sale of a drove of cattle, was rejected by the court.<sup>3</sup> *Clark v. Van Northwick*,<sup>4</sup> decided by the Supreme Court of Massachusetts in 1823, conflicts with the rule in the cases just cited. The plaintiff sent several boxes of lemons and oranges from Boston to the defendants at New York, with directions to sell them for cash. A week later the defendants sold them to a person in good credit, sending in their bill the next day for payment. In the meantime, however, the purchaser had become insane, and only a portion of the money was paid. On the trial of an action for the balance, the question arose whether this was a sale "for cash," and the defendants introduced evidence to show that both at Boston and New York, when orders were received to sell goods for cash, although the seller has the right to demand the cash on delivery of the goods, it is nevertheless usual, if the purchaser is in good credit, to deliver the goods, and send in the bill for payment the next day, or within two or three days; and that such, in the understanding of merchants, would be a sale "for cash." The jury were instructed that if this custom was proved it would relieve the defendants, and they returned a verdict in their favor. In the higher court the ruling was affirmed. "Upon the evidence of the usage," it was said, "which was properly admitted, the jury have found that this was a cash sale, and it would embarrass business very much if it were not so considered. The defendants did not intend to allow the purchaser a credit for any length of time. They might have sued him immediately after the delivery of the fruit. Such a sale is no violation of orders to sell for cash, unless it is made to a person in insolvent circumstances, which is not the case here."

Where goods are left with the clerk of a forwarder, with special directions as to the mode of transportation and delivery, it is the duty of the forwarder to forward the goods together with the directions; and a custom of the place where the business is transacted that forwarders' clerks will not forward special directions, if not known to the owner, will not bind him.<sup>5</sup>

§ 154. **Liability of Principal and Agent on Contracts.**—As a general rule, an agent is not personally bound by a contract made by him for his principal. An agent, as such, and contracting as agent and not as principal, incurs no per-

<sup>1</sup> *Bliss v. Arnold*, 8 Vt. 252.

<sup>2</sup> *Catlin v. Smith*, 24 Vt. 85.

<sup>3</sup> *Leland v. Douglass*, 1 Wend. 490. And

see *Stewart v. Seudder*, 2 Am. L. Reg. (n. s.) 80 (New Jersey).

<sup>4</sup> 1 Pick. 343.

<sup>5</sup> *Hutchins v. Ladd*, 16 Mich. 493.

## Liability on Contracts.

sonal responsibility upon the contract itself.<sup>1</sup> This principle runs through all the cases, the apparent conflict being where, upon the facts of different cases, it has been decided in different ways, that the agent has or has not sufficiently described himself to the other contracting party as acting in the capacity of an agent.<sup>2</sup> The law in England seems to be established that an agent signing a contract as agent, or showing his agency in some manner, is not personally liable, even though his principal's name be not disclosed.<sup>3</sup> On the other hand, Judge STORY states the American rule to be that agents will be personally bound on contracts made by them, "where they are known to be agents and acting in that character, but the name of their principal is not disclosed; for, until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent and trusting to an unknown principal, who may be insolvent or incapable of binding himself."<sup>4</sup> But the English courts have been liberal in allowing evidence of usage to show a different understanding in different trades. In several well-considered cases, an agent who has entered into a written contract for an undisclosed principal has been made personally liable, upon proof of a custom recognizing such a liability.

In the leading case of *Hunfrey v. Dale*,<sup>5</sup> the defendants, London brokers, being employed to buy oil for their principal, gave the vendor a note as follows: "Sold this day for Messrs. Thomas & Moore to our principals, ten tons of linseed oil. Dale, Morgan & Co., brokers." The defendants did not disclose the name of their principal at the time, and evidence was admitted at the trial that, according to the usages of the trade, whenever a broker purchased without disclosing the name of his principal he was personally liable on the contract. This ruling was affirmed on appeal. This case was decided in 1857.

*Fleet v. Murton*<sup>6</sup> was decided in 1871. The defendants were fruit-brokers in London, and were employed by the plaintiffs, who were merchants in London, to sell for them. They gave to the plaintiffs the following note: "We have this day sold for your account to our principal" certain tons of raisins. "Signed, Murton & Webb, brokers." The defendants' principal having refused to accept a part of the raisins, the plaintiffs brought an action against the defendants, and gave evidence that, in the London fruit-trade, if the brokers did not give the names of their principals in their contracts they were held personally liable, although in fact they contracted as brokers for a principal. On the strength of this evidence the plaintiffs had a verdict. In the Court of Queen's Bench the custom was recognized, COCKBURN, C. J., saying: "Although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself, chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another and giving to another rights under the contract, he himself will incur the same liability as his principal. Now,

<sup>1</sup> 2 Kent's Comm. 629; Evans on Ag. 308.

<sup>2</sup> Green v. Kopke, 18 C. B. 519; Mahoney v. Kekuhe, 14 C. B. 390; Reid v. Draper, 6 Hurl. & N. 813; Fairlee v. Fenton, L. R. 5 Exch. 169; Paice v. Walker, L. R. 5 Exch. 173; Sharman v. Brandt, L. R. 6 Q. B. 720;

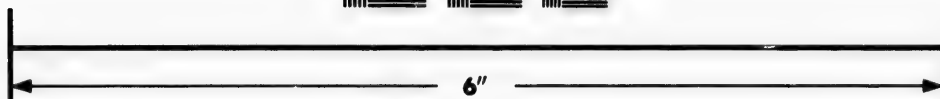
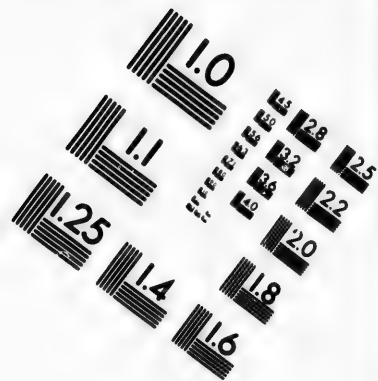
Southwell v. Bowdich, L. R. 1 C. P. Div. 100; Gadd v. Houghton, L. R. 1 Exch. Div. 357.

<sup>3</sup> Evans on Ag. 194, and cases ante.

<sup>4</sup> Story on Ag., § 267 (citing Winsor v. Griggs, 5 Cush. 210).

<sup>5</sup> 7 El. & Bl. 266, post, Chap. IV.

<sup>6</sup> L. R. 7 Q. B. 126, ante, p. 90.



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## Principal and Agent.

although where a party professes to contract as broker it might *prima facie* be taken that he contracts without the intention of incurring liability on his own part, yet if by the custom of the particular trade there is that qualification of the contract which, if written into the contract, would undoubtedly bind him, the qualification may, I think, be imported into the contract by evidence of the custom. \* \* \* The defendants here undoubtedly call themselves brokers, acting for their principal. But if the custom attaches, the non-liability which would under ordinary circumstances *prima facie* exist in a contract made by a person purporting to contract as broker ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade." BLACKBURN, J., was of the same opinion. "I agree," said he, "that in the present case, if it were not for the evidence of custom, the defendants, who contract for a principal — 'sold to our principal' — and sign as brokers, would not have been liable at all upon this contract. But then there came the custom, and the evidence of custom was to this effect: that in this trade the brokers deal on these terms. The custom is, that if the broker does not disclose his principal's name he is personally liable."

*Hutchinson v. Tatnell*,<sup>1</sup> a still stronger case, was decided in 1873. The defendants, acting as agent for one L., with his authority chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was signed by the defendants as "agents to merchants," the name of the principal not being disclosed. At the trial the plaintiff offered evidence, which was admitted, of a trade usage that if the principal's name is not disclosed within a reasonable time after the signing of the charter-party the broker shall be personally liable. In the Common Pleas it was held that the evidence was rightly admitted, relying upon *Humfrey v. Dale* and *Fleet v. Murton* as authority for their decision. A usage of trade may render agents and factors acting for persons resident in a foreign country personally liable on contracts made for their employers, although they fully disclose the character in which they act.<sup>2</sup>

But a person contracting as agent will be personally liable where he makes the contract in his own name.<sup>3</sup> In such cases, evidence of usage to exonerate an agent from personal liability has been held inadmissible. In *Magee v. Atkinson*,<sup>4</sup> decided in 1837, A., a broker employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in his book as of a sale from A. to C., and a contract note to that effect was sent to C. A. subsequently saw the entry in the book, and attested it by writing in the name of B. as seller. Another note was accordingly sent the same evening or the next morning to C., but C. received them both together; he did not return the first note, nor did A. request it. In an action by D. against A. for breach of the agreement in not completing the sale, PATERSON, J., left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant entered into a written contract in his own name he could not afterwards set up that he was acting merely as a broker, and that, although known to be a broker, if he signed the contract in his own name he was liable. He also

<sup>1</sup> L. R. 8 C. P. 482.

<sup>2</sup> *McKenzie v. Nevins*, 3 Mass. 434.

<sup>3</sup> *Jones v. Littledale*, 6 Ad. & E. 486; *Hopkins v. Mahaffy*, 11 Serg. & R. 129; *Kirkpatrick v. Stainer*, 22 Wend. 244; and cases cited in Story on Ag., § 269.

<sup>4</sup> 2 Mee. & W. 440.

## Vendor and Purchaser.

rejected evidence that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name. The plaintiff having recovered a verdict, the direction and ruling of the trial judge were affirmed by the court *in banc*. "The custom offered to be proved," said ALDERSON, B., "is a custom to violate the common law of England."

In *Trueman v. Loder*,<sup>1</sup> decided in 1840, L., a merchant residing at St. Petersburg, carried on business through H. H., having ceased to represent L., contracted with T. to sell him tallow, intending to make a contract for himself, but T. thought him an agent for L., as before. The contract was made by W., a broker, acting for both. He signed bought-and-sold notes, the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals." It was held that L. was liable for the non-delivery of the tallow, and that evidence of a custom in the tallow trade that "a party might reject the undisclosed principal and look to the broker for the completion of the contract, was inadmissible."

§ 155. **Attorney and Client.** — A custom for attorneys to charge a client with a term-fee at each term, excepting at the term at which the case is argued, when an arguing-fee is taxed instead, and in addition thereto, when the defendant prevails, to charge the client with the taxable costs, exclusive of witnesses' fees and money advanced by the client, is reasonable and valid.<sup>2</sup> So, retainers are chargeable by custom, without a special contract;<sup>3</sup> and attorneys may, by custom, become responsible for a sheriff's fees in the stead of the client.<sup>4</sup>

## IX. VENDOR AND PURCHASER.

§ 156. **Usages of Trade affecting Sales.** — As a general thing, where nothing is said as to the terms of sale, it is presumed to be made in compliance with the usage of the particular trade or of the parties. Evidence of usage in a particular trade is admissible for the purpose of showing the modes of effecting sales — as, for example, the usage of the cloth trade relative to the return of cloth sent for inspection;<sup>5</sup> or that, according to the known usages of the cotton trade, cotton is always sold by sample;<sup>6</sup> that upon the sale of berries in bags by sample, the custom of the trade is that the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag, taken separately;<sup>7</sup> that it is the custom among flour-merchants that the vendee may rescind the sale and return the flour within ten days, if it prove to be unsound and damaged.<sup>8</sup> An offer sent by mail, by one who understands that according to the usage of business a reply may be sent by mail, carries with it an authority to communicate acceptance by mail.<sup>9</sup> A usage in the liquor trade, upon the sale of liquor in barrels, to measure but one barrel in ten, and then make an estimate of the whole based on this measurement, has been

<sup>1</sup> 11 Ad. & E. 589.

<sup>2</sup> *Bodfish v. Fox*, 23 Me. 90; *Codman v. Armstrong*, 28 Me. 91.

<sup>3</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>4</sup> *Doughty v. Page*, 48 Iowa, 483.

<sup>5</sup> *Wood v. Wood*, 1 Car. & P. 59; *ante*, p. 5. And see *Leigh v. Mobile, etc., R. Co.*, 58 Ala. 165.

<sup>6</sup> *Boorman v. Johnston*, 12 Wend. 566; *Willings v. Consequa*, 1 Pet. C. Ct. 225. And see *Atwater v. Clancy*, 107 Mass. 369.

<sup>7</sup> *Schnitzer v. Oriental Print-Works*, 114 Mass. 123; *Leonard v. Fowler*, 44 N. Y. 289.

<sup>8</sup> *Randall v. Kehlor*, 60 Me. 37.

<sup>9</sup> *Wall's Case*, L. R. 15 Eq. 18.

## Vendor and Purchaser.

adjudged reasonable and valid. An action was brought in a New York court to recover the value of one hundred and forty gallons of liquor, being a deficiency in quantity on a sale of liquor in barrels by the defendant to the plaintiff. The deficiency had been ascertained by measuring one in ten of the barrels, according to the custom of the trade, which was proved on the trial. The court held that, this being the custom, an actual measurement of each barrel need not be shown before a recovery could be had, and the plaintiff had a verdict. On appeal, the reasonableness of the usage was affirmed. "It did not," said BRADY, J., "contravene any established rule of law, on any given state of facts, but related simply to the mode of ascertaining a fact upon which a rule of law might be declared. The contract between the parties, enlarged or fully expressed by reference to the custom mentioned, would be: 'I sell you a number of barrels of liquor, which I say contain a certain number of gallons, stated on this bill, but the exact quantity may be ascertained by measuring ten out of every one hundred of the barrels, or in like proportion for any number, and making a general estimate founded upon such measurement.' This mode of ascertaining the quantity is reasonable and convenient. It is equally open to both parties, and must result often in a saving of labor, time, and expense. It does not contravene any policy or principle of the law, and is, in fact, an agreement that as to quantity both seller and buyer may, by a system of average, determine the number of gallons contained in a number of barrels, without gauging or measuring each one. As a commercial usage it seems to be one of great utility, as, so far as the evidence given in this case illustrates its operation, it subserves the ends of justice, inasmuch as no testimony was offered by the defendant to controvert the result of the examination by the plaintiff's witnesses."<sup>1</sup> And where the plaintiff sent a quantity of cider to the defendant to be sold by him, and after the cider was so disposed of the defendant returned other barrels, equal in number and value to the original ones, but the plaintiff demanded and brought trover for the original barrels, it was held that the defendant was protected by giving in evidence a custom of the trade to let the casks go to the purchaser with their contents, and return others of equal value. And in the sale of tobacco, usage may show that the weight is computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale.<sup>2</sup> So of a custom to sell lumber without measuring it.<sup>3</sup>

In *Bliven v. New England Screw Company*,<sup>4</sup> the action was for the breach of several contracts for the delivery of screws, of which the defendants were the manufacturers. The contracts were admitted, but to excuse their non-performance the defendants proved that they were the sole manufacturers in the United States, and were constantly receiving orders from their customers faster than

<sup>1</sup> *Dalton v. Daniels*, 2 Hilt. 472.

<sup>2</sup> *Sturgis v. Buckley*, 32 Conn. 18. "The plaintiff claimed that the custom was not reasonable. The court held that it was so in the former case. It would be most unreasonable to insist that cider sent to market should be drawn off into different casks whenever transferred from one person to

another, and that the precise barrels should be sent back to the original owner. About as well might this change be required in the case of flour, or pork, or fish." *McCurdy*, J., in *Sturgis v. Buckley*, 32 Conn. 255.

<sup>3</sup> *Jones v. Hoey*, 128 Mass. 585.

<sup>4</sup> *Lee v. Kilburn*, 3 Gray, 594.

<sup>5</sup> 23 How. 430.



## Terms of Sale.

they could fill them, and for larger quantities than they were able to produce. The plaintiff alleged that the orders had been unconditional, and had been accepted without reservation. The defendants gave evidence of a custom in their business to fill orders received of customers in their regular order, according to date, and as fast as the articles could be made. It was held in the Supreme Court of the United States that the case must be decided with regard to that custom. "Nothing can be plainer," said Mr. Justice CLIFFORD, "than the proposition that the evidence in the case proved that the supply with the defendants was much less than the demands of their customers. To avoid dissatisfaction, therefore, they were obliged to devise some system which would enable them to do equal justice among those who were properly competing for the article. Accordingly, they adopted a rule to accept all such requests, and to enter the list in a book kept for the purpose, and to fill them, as far as possible, in the order they were received. They had been in business for some time, and that rule had become the custom of their trade, and as such was well known to the plaintiffs during all the time of these transactions. Many of their orders, thus given at short intervals, had been expressly accepted to be filled in turn or in course, and the correspondence plainly showed that the plaintiffs well knew what was meant by those terms. Evidence to prove that the orders had been taken up in turn, and filled in proportion to the orders given by other customers, was therefore admissible in order to show that the defendants had fulfilled their contract and done no injustice to the plaintiffs; and it is equally clear that evidence to show what had been the usage of the defendants' business was also admissible, because that usage constituted an essential part of the several contracts which were the subjects in controversy."

§ 157. *Terms of Sale — Price — Credit.* — Where nothing has been agreed as to price, or the contract is silent thereon, the law implies a promise to pay at the usual market rates.<sup>1</sup> So, in regard to credit, usage is relevant<sup>2</sup> — as, the usage of dry-goods jobbers in Boston that goods not purchased on a cash sale are purchased on a credit of six months where the bills are not marked;<sup>3</sup> or a usage in the flour trade that where the contract is silent upon the point it is for cash, but the purchaser has ten days in which to examine the goods.<sup>4</sup> Such proof may often be of importance to prevent the Statute of Limitations from defeating a recovery for the price.<sup>5</sup> A usage that where cotton stored in a warehouse is found to be in a damaged condition, the warehouseman shall send it to a pickery to be "picked," and that the factor shall be responsible for the expense, is reasonable and binding.<sup>6</sup> And evidence of usage is admissible to show that on a sale of coal shipped from the United States to Canada, the purchasers pay the customs duties when they land the goods.<sup>7</sup>

<sup>1</sup> *Konitzky v. Meyer*, 49 N. Y. 571; *Booth v. Pierce*, 38 N. Y. 463; *Bennett v. Drew*, 3 Bosw. 355; *Sturm v. Williams*, 38 N. Y. S. C. (J. & S.) 323; *Harris v. Panama R. Co.*, 58 N. Y. 600; *Cliquot's Champagne*, 3 Wall. 114.  
<sup>2</sup> *Swancott v. Westgarth*, 4 East, 71; *Gordon v. Swan*, 2 Camp. 429; *Deshler v. Beers*, 32 Ill. 368.

<sup>3</sup> *Farnsworth v. Chase*, 19 N. H. 535.

<sup>4</sup> *Seuddler v. Bradbury*, 106 Mass. 422.

<sup>5</sup> *Hursh v. North*, 40 Pa. St. 241.

<sup>6</sup> *Desha v. Holland*, 12 Ala. 513. And see *Holmes v. Gayle*, 1 Ala. 517.

<sup>7</sup> *Brown v. McDonnell*, 9 Upper Canada Q. B. 312.

## Vendor and Purchaser.

§ 158. **The Rule Caveat Emptor — Warranties on Sales.** — On sales of personal property, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the articles he sells, the maxim *caveat emptor* applies, and the buyer takes the risk of the quality upon himself. This doctrine is recognized by the English courts,<sup>1</sup> and is so universally accepted in this country that the courts of all the States in the Union where the common law prevails, with but one exception,<sup>2</sup> sanction it. Whether this rule can be controlled to any extent by custom, and whether a warranty may be implied by usage where the law implies none, has been much discussed in the courts. In the English case of *Jones v. Bowden*,<sup>3</sup> it was proved that in auction sales of certain drugs — as, pimento — it was the custom to state in the catalogue whether they were sea-damaged or not; and in the absence of a statement that they were sea-damaged, they were assumed to be free from that defect. The court held, on this evidence, that freedom from sea-damage was impliedly warranted in the case, *HEATH, J.*, referring to a *Nisi Prius* decision of his, that where sheep were sold as stock there was an implied warranty that they were sound, proof having been given that such was the custom of the trade.<sup>4</sup> This ruling is referred to at some length by Mr. BENJAMIN in the last edition of his work on *Sales*, and, relying upon it as an authority, he states it as a general rule that an implied warranty may result from the usage of a particular trade. On the other hand, in the American case of *Barnard v. Kelllogg*<sup>5</sup> it was held by the Supreme Court of the United States, in 1870, that a custom of dealers in wool in New York and Boston to imply from the fact of sale alone a warranty from the seller that the wool is not falsely packed, was not admissible to control the general rules of law in relation to the sale of personal property.<sup>6</sup> The same view was taken by the Supreme Judicial Court of Massachusetts, in 1865, concerning a usage in the hide and leather trade at Boston to impliedly warrant all goods to be of merchantable quality. "The decisive objection to its recognition," said BIGELOW, C. J., "is that it embraces an element directly contrary to the ancient and well-established rule of the common law that a vendor cannot be held responsible for the quality of goods sold if he makes no warranty or representation concerning their nature, condition, or merchantable value. In other words, it abrogates, to a certain extent, the maxim *caveat emptor*, and puts on

<sup>1</sup> *Clare v. Maynard*, 7 Car. & P. 241; *Hall v. Condon*, 2 C. B. (N. S.) 22; *Early v. Garrett*, 9 Barn. & Cress. 923; *Springwell v. Allen*, Aleyn, 91; 2 East, 448; *Williams v. Allison*, 2 East, 446; *Morley v. Attenborough*, 3 Exch. 500; *Hopkins v. Tanqueray*, 15 C. B. 130.

<sup>2</sup> The single exception is South Carolina, where *caveat venditor* is the rule. See *Barnard v. Yates*, 1 Nott & M. 142.

<sup>3</sup> *Barnard v. Kelllogg*, 10 Wall. 383; *Willings v. Consequa*, 1 Pet. C. Ct. 301; *Holden v. Dakin*, 4 Johns. 421; *Sweet v. Colgate*, 20 Johns. 196; *Hawkins v. Pemberton*, 6 Robt. 42; *Walsh v. Center*, 1 Wend. 185; *Frazier v. Harvey*, 34 Conn. 469; *Hadley v. Clinton*, et al., Co., 13 Ohio St. 502; *Lord v. Grow*, 39 Pa. St. 84; *Irving v. Thomas*, 18 Me. 418; *Otis v. Alderson*, 10 Smed. & M. 476; *Dean v.*

*Mason*, 4 Conn. 428; *Moses v. Mead*, 1 Demo. 378; *King-bury v. Taylor*, 29 Me. 508; *West v. Cunningham*, 9 Port. 104; *Seixas v. Wood*, 2 Caines, 48; *Wright v. Hart*, 18 Wend. 449; *Johnston v. Cope*, 3 Har. & J. 89; *Cozzins v. Whittaker*, 3 Stew. & P. 322; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Winsor v. Lombard*, 13 Pick. 59; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Jackson v. Wetherill*, 7 Serg. & R. 490; *Polhemus v. Heiman*, 45 Cal. 573; *Murray v. Smith*, 4 Daly, 277.

<sup>4</sup> 4 Taun. 847, ante, p. 186.

<sup>5</sup> *Weall v. King*, 12 East, 452.

<sup>6</sup> *Benj. on Sales* (2d ed.), § 655.

<sup>7</sup> 10 Wall. 383, post, Chap. V.

<sup>8</sup> And see *Mixer v. Coburn*, 11 Mete. 559; *Casco Man. Co. v. Dixon*, 3 Cush. 407; *People's Bank v. Bogert*, 16 Hun, 270.

## Caveat Emptor.

the vendor the burden of warranty, although he may be ignorant of the quality of the article, or may have had no means of ascertaining its condition or value, and may have had no intention of selling the article with warranty. Such a usage is very like the one relied upon in the leading case of *Thompson v. Ashton*,<sup>1</sup> which was held invalid and of no effect because it tended to introduce vagueness, confusion, and uncertainty into the rules regulating the rights and obligations of parties under contracts for the sale of merchandise.<sup>2</sup> In Pennsylvania, in *Snowden v. Warder*,<sup>3</sup> decided in 1831, the Supreme Court admitted evidence of a usage in the city of Philadelphia that the seller of cotton warranted against latent defects, though there was neither fraud on his part nor actual warranty, Chief Justice Gibson entering a vigorous dissent. Twenty-one years later *Snowden v. Warder* was disapproved,<sup>4</sup> and in *Wetherill v. Neilson*<sup>5</sup> was substantially overruled. It is held in Rhode Island that the barter or exchange of a promissory note, indorsed without recourse, for cotton or other merchandise, carries with it no implied warranty of the past or future solvency of the maker, the rule of *caveat emptor* applying in the absence of fraud;<sup>6</sup> and that in such cases evidence is not admissible to show that, according to the custom of the trade, if it turned out that the maker of the note was insolvent at the time of the bargain, the seller had the right to repudiate or rescind the contract.<sup>7</sup>

§ 159. *Warranty of Goodness—Continued.*—In an Ohio case,<sup>8</sup> a usage among tobacco dealers in Cincinnati to warrant, on sales of tobacco of a particular description, the article to remain sound and merchantable for the space of four months after the sale, was admitted, the court relying upon *Jones v. Bowden*.<sup>9</sup> But in New York it has been held that usage is not admissible to show that the sale of any particular article implies a warranty of its goodness. In *Thompson v. Ashton*,<sup>10</sup> decided by the Supreme Court of New York in 1817, the plaintiff's agent went to the store of the defendant to purchase crockery-ware, and the latter sold him forty-six crates of crockery-ware, according to the printed catalogue of certain auctioneers in whose store the crockery was for sale, which catalogue conformed to the invoice. The witness did not open the crates; but, after they were sent to the plaintiff, several of them were found to be bad, consisting of ware of an inferior quality. The plaintiff desired to rescind the sale, but the defendant refusing, he brought an action for the fraud, and on the trial offered to prove that it was the custom and usage of merchants in this article that the purchaser purchased and the seller sold on the invoices, without opening the crates or examining the ware in them, and that it was the uniform understanding in the trade, in such transactions, that the exhibition of the invoices amounted to an understanding on the part of the seller that the ware was good and merchantable. The trial judge rejected this evidence, and the plaintiff was nonsuited. On appeal, the court sustained the ruling, saying: "The evidence offered of a usage or custom in relation to the sale of crockery-ware was properly rejected. No custom, in the sale of any particular descrip-

<sup>1</sup> 13 Johns. 416.

<sup>2</sup> *Dodd v. Farlow*, 11 Allen, 426; *Boardman v. Spooner*, 13 Allen, 353. And see *Baird v. Matthews*, 6 Dana, 129.

<sup>3</sup> 3 Rawle, 101.

<sup>4</sup> *Coxe v. Heasley*, 19 Pa. St. 243.

<sup>5</sup> 20 Pa. St. 448.

<sup>6</sup> *Bicknell v. Waterman*, 5 R. I. 43.

<sup>7</sup> *Beckwith v. Farnum*, 5 R. I. 230.

<sup>8</sup> *Fatman v. Thompson*, 2 Disney, 482.

<sup>9</sup> 4 Taun. 483.

<sup>10</sup> 14 Johns. 316.

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## Vendor and Purchaser.

tion of goods, can be admitted to control the general rules of law. Such a principle would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sale of chattels."

§ 160. **Warranty—Sale by Sample.**—The rule may now be regarded as firmly established, says Mr. PARSONS,<sup>1</sup> that where goods are sold by sample, the seller is held to warrant that they correspond with the sample.<sup>2</sup> The exhibition of a sample is equivalent to an affirmation that all the goods sold by it are similar.<sup>3</sup>

But if the sample be fairly drawn from the bulk of the goods, and the bulk corresponds with the sample, but there is a defect in both sample and bulk, and this defect is unknown and undiscoverable, there is no implied warranty against this defect, and the seller is not responsible.<sup>4</sup> A usage in opposition to this rule has been held invalid in Massachusetts. In *Dickinson v. Gay*,<sup>5</sup> the sale was of unprinted satinet cloths purchased of the manufacturer by sample, and it appeared that the bulk of the goods was not equal to the sample; that both the sample and the bulk of the goods were damaged by mildew, and that the defect was latent, and could not be discovered until the goods were printed. The defendants offered evidence, in an action for the price of the goods, of a usage of merchants by which, in such cases, the seller should make good to the purchaser the damage occasioned by the defect. The court admitted this evidence, and the jury, in answer to special questions, found that the usage existed; that there was a defect in the goods; that it diminished their value in the sum of \$1,456.23; that the goods were not equal to the sample, and that this last defect diminished the value of the goods in the sum of \$517.18. The plaintiff had a verdict for the balance of the price at which the goods were bargained for, deducting the sum of \$517.18, thus rejecting the effect of the usage. On appeal, the judgment was affirmed, the court holding that the deduction of \$517.18 was properly allowed. "The sale," said CHAPMAN, J., "was by sample. On such a sale it is admitted that the law implies a warranty that the bulk of the goods shall be equal in quality to the sample.<sup>6</sup> The jury have found that these goods were not equal to the sample, and have assessed the damages at \$517.18.

<sup>1</sup> 1 Pars. on Con. 598.

<sup>2</sup> 2 Kent's Comm. 481; Benj. on Sales, § 648; *Dickinson v. Gay*, 7 Allen, 29; *Williams v. Spofford*, 8 Pick. 250; *Oneida Man. Co. v. Lawrence*, 4 Cow. 440; *Gallagher v. Waring*, 9 Wend. 20; *Boorman v. Jenkins*, 12 Wend. 596; *Waring v. Mason*, 18 Wend. 425; *Hargous v. Stone*, 5 N. Y. 73; *Belrne v. Dodd*, 5 N. Y. 95; *Phillipi v. Gove*, 4 Rob. (La.) 315; *Hall v. Plassan*, 19 La. An. 11; *Ricks v. Dillahunty*, 8 Port. 140; *Magee v. Billingsley*, 3 Ala. 619; *Brantley v. Thomas*, 22 Texas, 270; *Gunther v. Atwell*, 19 Md. 157; *Otis v. Alderson*, 10 Smed. & M. 476; *Borckins v. Bevan*, 3 Rawle, 37; *Hanson v. Russo*, 45 Ill. 498; *Day v. Raguet*, 14 Minn. 273; *Bragg v. Morrill*, 49 Vt. 45; *Bradford v. Manly*, 13 Mass. 138; and note, 7 Am. Dec. 128.

<sup>3</sup> *Story on Sales*, § 376; *Longmer v. Smith*, 1 Barn. & Cress. 1; 2 Dow. & Ry. 23; *Hibbert v. Shee*, 1 Camp. 113; *Parkinson v. Lee*, 2 East, 314; *Beebe v. Robert*, 12 Wend. 413; *Parker v. Palmer*, 4 Barn. & Ald. 387; *Andrews v. Kneeland*, 6 Cow. 654; *Hastings v. Lovering*, 2 Pick. 219; *Sands v. Taylor*, 5 Johns. 359; *Gatling v. Newell*, 9 Ind. 572; *Moses v. Mead*, 1 Denio, 385; *Rose v. Beattie*, 2 Nott. & M. 538; *Brower v. Lewis*, 19 Barb. 574; *Orinrod v. Huth*, 14 Mee. & W. 663.

<sup>4</sup> *Story on Sales*, § 376; *Parkinson v. Lee*, 2 East, 313; *Orinrod v. Huth*, 14 Mee. & W. 663; *Carter v. Crick*, 4 Huri. & N. 412; *Gunther v. Atwell*, 19 Md. 157; *Sands v. Taylor*, 5 Johns. 395.

<sup>5</sup> 7 Allen, 29.

<sup>6</sup> *Bradford v. Manly*, 13 Mass. 139.

## Sales by Manufacturer.

This sum is therefore to be deducted from the agreed price." But the usage set up in the case was adjudged invalid. After reviewing the cases in which usages in opposition to rules of law had been rejected, CHAPMAN, J., said: "There is no necessity for such usages; because, if the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale, or if the manufacturer sells without warranty he can so express it. But, if such usages were to prevail, they would be productive of misunderstanding, litigation, and frequent injustice, and would be deeply injurious to the interests of trade and commerce. They would make it necessary to prove the law of the case by witnesses on the stand, and it would be settled by the jury in each particular case. Public policy, therefore, requires that when parties assume obligations which the law does not impose, or release obligations which it does impose, it should be done by express contract." In a Maryland case it was held that evidence was competent to show that, according to the usage of the tobacco trade in the city of Baltimore, a purchaser does not look to the seller to insure a correspondence between the quality of the tobacco in the sample and in the hogsheds, but relies exclusively upon the sample and the fidelity of the public inspector.<sup>1</sup> Again: the mere exhibition, at the time of the sale, of a sample of the goods does not of itself constitute such a sale by sample as to subject the seller to liability upon an implied warranty, for the reason that such sample may only be shown to enable the purchaser to form an opinion of its probable qualities, without any intention on the part of the seller to warrant all the goods sold to be equal to it.<sup>2</sup> The seller by sample is, perhaps, presumed to warrant that the bulk is of the same kind, and equal in quality with the sample in reference to which the contract is made. But, to enforce such a contract when denied, it must be established by evidence of the acts and declarations of the parties tending to prove a contract of sale by sample,<sup>3</sup> and cannot be established by proof that it was the general custom of persons dealing in the particular article thus to contract.<sup>4</sup>

§ 161. **Warranty—Sales by Manufacturer.**—The general rule of law that upon the sale of an article by a manufacturer there is an implied warranty that it will answer the purpose for which it is made,<sup>5</sup> may not be altered by usage; as, for example, by a usage of founders not to warrant their castings against latent defects, or, in the case of patent defects, to be entitled to have the castings returned in a reasonable time, and to have the option of replacing them

<sup>1</sup> Gunther v. Atwell, 19 Md. 157.

<sup>2</sup> Hargous v. Stone, 1 Seld. 73; Waring v. Mason, 18 Wend. 425; Hanson v. Busch, 45 Ill. 490; Towell v. Gatewood, 3 Ill. 22; Adams v. Johnson, 15 Ill. 345; Kohl v. Linder, 39 Ill. 195; Rose v. Beattie, 2 Nott & M. 538; Brower v. Lewis, 19 Barb. 574; Gardiner v. Gray, 4 Camp. 144; Powell v. Horton, 2 Bing. N. C. 608.

<sup>3</sup> Waring v. Mason, 18 Wend. 425; Osborn v. Gantz, 60 N. Y. 540; Boyd v. Wilson, 83 Pa. St. 319.

<sup>4</sup> Beirne v. Dodd, 3 Sandf. 89; 5 N. Y. 73.

<sup>5</sup> Olivant v. Bayley, 5 Q. B. 288; Chanter

v. Hopkins, 4 Mee. & W. 399; Jones v. Bright, 5 Bing. 533; Brown v. Edgington, 2 Man. & G. 279; Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358; Jones v. Just, L. R. 3 Q. B. 197; Port Carbon Iron Co. v. Groves, 63 Pa. St. 149; Brown v. Murphee, 31 Miss. 91; Field v. Kinnear, 4 Kan. 478; Street v. Chapman, 29 Ind. 142; Kingsbury v. Taylor, 29 Me. 508; Pacific Iron-Works v. Newhall, 34 Conn. 67; Hoe v. Sanborn, 21 N. Y. 552; Bragg v. Morrill, 49 Vt. 45; Mason v. Chappell, 15 Gratt. 572; Gerst v. Jones, 10 Cent. L. J. 151; Bigge v. Parkinson, 7 Hurl. & N. 955.

## Vendor and Purchaser.

with new ones.<sup>1</sup> But evidence of a custom of manufacturers of iron-castings to warrant the quality of the articles made by them, without an express contract to that effect, is admissible in an action on the implied warranty.<sup>2</sup>

§ 162. **Pledgeor and Pledgee.** — It was intimated by NELSON, C. J., in an early New York case, that on a simple pledge of stock to a broker as collateral security, though the pledgee has no right to dispose of it before the pledgeor fails to comply with his engagement, yet usage may change this, — *e.g.*, the general custom of brokers to hypothecate or dispose of it at pleasure, and on payment or tender of the principal debt, to return an equal number of the shares of the same kind of stock.<sup>3</sup> This language, however, was *obiter*, and has been disapproved in subsequent New York cases, where the law concerning pledges, and the effect of customs derogatory thereto, have been considered. Thus, in *Mackay v. Jaudon*,<sup>4</sup> the defendants, who were stock-brokers, purchased certain stocks for plaintiff in their own names and with their own funds, he depositing with them a "margin" of ten per cent, which he agreed to "keep good." The plaintiff having failed to "keep the margin good," the defendants sold out the stock without notice to him. It was held by the Court of Appeals that the relation between the parties was that of pledgeor and pledgee; that a sale under such circumstances without notice was a conversion; and that, in an action by the plaintiff for such conversion, evidence of a usage that stock held as in this case might be sold by the broker whenever, by the fall of the stock in the market, the "margin" was exhausted and not renewed, was inadmissible, because in direct variance with the rules of law applicable to the relation of the parties. "This was an offer," said HUNT, C. J., referring to the evidence rejected, "not to explain the meaning of particular terms, or to prove attending circumstances to enable the court to construe the agreement, but to change the rights of the parties to a contract. By the law, as I have interpreted it, the customer did not lose the title to his stock by any process less than a sale upon reasonable notice, or by judicial proceedings. The broker had no right to sell without such a notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase the shares at all in a case like the present, but to content themselves with a memorandum or entry in their books of the contract made with their customer." This case was followed seven years later in *Baker v. Drake*,<sup>5</sup> decided in 1876.

§ 163. **Sales by Auction.** — In *Atkins v. Howe*,<sup>6</sup> goods consisting of a case of French printed muslins, and consigned by the defendants to an auctioneer, were sold by him to the plaintiff. Among the conditions of sale was the following, which was printed on the catalogue, and read by the auctioneer before the sale commenced: "No allowance made for damage on sample packages, nor on any other packages, unless applied for within three days from the sale, at which time the bills must be settled." The goods were not returned until two months

<sup>1</sup> *Whitmore v. South Boston Iron Co.*, 2 Allen, 52.

<sup>2</sup> *Sumner v. Tyson*, 20 N. H. 384.

<sup>3</sup> *Allen v. Dykers*, 3 Hill, 593.

<sup>4</sup> 41 N. Y. 335.

<sup>5</sup> 66 N. Y. 518. And see *Stenton v. Jerome*, 51 N. Y. 480; *Taylor v. Ketchum*, 5 Robt. 507; *Wheeler v. Newbould*, 5 Duer, 26; 16 N. Y. 392.

<sup>6</sup> 18 Pick. 16.



## Rescission of Contracts.

after the sale, when the plaintiff, on the ground that they were damaged, returned them and brought an action for the price, contending on the trial that the limitation of three days in the conditions of sale did not apply to the owners of goods sold at auction, and offered evidence that, according to the custom of merchants at Boston, goods were returned by purchasers at auction to the owners, and received by them or allowances made after the expiration of the three days, if within a reasonable time after the sale. But the evidence was rejected, *SHAW, C. J.*, saying: "The evidence of custom, as offered, was plainly inadmissible. Custom is often of importance to show how parties are to be understood in the language which they have used, but this is not such a case. Here was a claim for damage. The terms of sale were that all claims for damage must be made within three days, and before the bills were settled. The usage had no tendency to alter or affect the terms or meaning of this stipulation." The usage of auctioneers that their implied warranty shall expire after a certain time, at the expiration of which time the parties are in the same position as if no warranty had been given, has been adjudged reasonable and binding upon purchasers.<sup>1</sup> Where a party purchased at an auction a quantity of indigo, notice being given at the time of sale that it would be sold subject to the usual tare of ten per cent, it being afterwards discovered that the indigo was fraudulently packed, and that the actual tare was seventeen per cent, he was allowed to show that in all cases of fraudulent packing it was the custom of the trade to allow the purchaser the actual tare.<sup>2</sup>

§ 164. **Rescission of Contract by Buyer.**—When a sale of goods is made upon false representations, the purchaser may return the goods and rescind the contract.<sup>3</sup> But if he be silent, and continue to treat the property as his own, he will be considered as waiving the objection, and will be as conclusively barred as if no fraud or fraudulent representation had occurred.<sup>4</sup> In this connection, another rule of law is well established, viz.: that *the purchaser must rescind the whole contract, and return the whole of the property; it cannot be rescinded in part and continued in part.*<sup>5</sup> The power of usage to alter this well-established rule is

<sup>1</sup> *Bywater v. Richardson*, 1 Ad. & E. 508; *Smart v. Hyde*, 8 Mee. & W. 723. And see *Denston v. Perkins*, 2 Pick. 86.

<sup>2</sup> *Sewall v. Gibbs*, 1 Hall, 602.

<sup>3</sup> *Phelps v. Quinn*, 1 Bush, 375; *Righter v. Roller*, 31 Ark. 170; *Holbrook v. Burt*, 23 Pick. 546; *Peters v. Gooch*, 4 Blackf. 515; *Bellamy v. Sabine*, 2 Phill. L. 425; *Pintard v. Martin*, 1 Smed & M. Ch. 126; *Caldwell v. Caldwell*, 1 J. J. Marsh. 53; *Mixer's Case*, 4 De G. & J. 586; *King v. Savery*, 5 H. L. Cas. 627. An offer on his part is sufficient without an actual return. *Smalley v. Hendrickson*, 29 N. J. L. 371; *Smith v. Smith*, 30 Vt. 137; *Barnett v. Stanton*, 2 Ala. 181; *Dill v. Camp*, 22 Ala. 249. And if the goods are of no value to either party, their return may be dispensed with. *Love v. Oldham*, 22 Ind. 51; *Garland v. Spencer*, 46 Me. 528; *Christy v. Cummins*, 3 McLean, 386.

<sup>4</sup> *McCulloch v. Scott*, 13 B. Mon. 172; *Thomas v. Bartow*, 48 N. Y. 300; *Jennings v.*

*Broughton*, 5 De G. M. & G. 539; *Boughton v. Standish*, 48 Vt. 594; *Grymes v. Sanders*, 93 U. S. 55; *Rutter v. Blake*, 2 Hayes & J. 355; *Norton v. Young*, 3 Me. 30; *Miller v. Grove*, 18 Md. 242.

<sup>5</sup> *Shields v. Pettee*, 2 Sandf. 262; *Morse v. Brackett*, 98 Mass. 205; *Manfield v. Trigg*, 113 Mass. 350; *Costigan v. Hawkins*, 22 Wis. 74; *Campbell v. Fleming*, 1 Ad. & E. 40; *Willinghby v. Moulton*, 47 N. H. 205; *Buchenau v. Horney*, 12 Ill. 336; *Clarke v. Dickson*, El. Bl. & El. 148; *Clay v. Turner*, 3 Bibb, 52; *Glassell v. Thomas*, 3 Leigh, 113; *Jopling v. Dooley*, 1 Yerg. 289; *Bradley v. Bostey*, 1 Barb. Ch. 125; *Kimball v. Cunningham*, 4 Mass. 405; *Connor v. Henderson*, 15 Mass. 319; *Miner v. Bradley*, 22 Pick. 457; *Perley v. Balch*, 23 Pick. 286; *Jenkins v. Simpson*, 2 Shep. 364; *Coolidge v. Brigham*, 1 Mete. 547; *Hunt v. Silk*, 5 East, 449; *Giles v. Edwards*, 7 Term Rep. 181; *Thornton v. Wynn*, 12 Wheat. 183; *Pulsifer v. Hotchkiss*, 12 Conn.



## Vendor and Purchaser

well illustrated by the case of *Clark v. Baker*.<sup>1</sup> The plaintiff purchased of the defendant a cargo of yellow and white corn, which was then lying on board a schooner belonging to the latter, the quantity being unknown. He agreed to pay a certain sum per bushel for the yellow corn, and another sum per bushel for the white corn, the defendant warranting it to be of a described quality, and did pay \$1,200 "on account of corn per schooner." The schooner was hauled to the plaintiff's wharf, and he transferred to his warehouse a part of the corn, and refused to receive the remainder on the ground that the residue was not of the kind the defendant had warranted it to be. He immediately gave the defendant notice that he would receive no more of his cargo, and requested him to take the schooner away. The corn taken by the plaintiff amounted, at the agreed price per bushel, to \$1,067, and he brought an action to recover back the difference between that sum and the \$1,200 paid by him in the first instance. The defendant set up that the contract was entire, and maintained that the action would not lie without proof that the plaintiff offered to return the corn which he had accepted. This objection was overruled, and the plaintiff had a verdict; but on appeal the defendant's position was sustained by the Supreme Court, and the judgment reversed and a new trial ordered. "We are of opinion," said the court, "that the bargain between the parties was an entire contract for the purchase of the whole cargo, and that the plaintiff, not having rescinded it, cannot maintain the present action for the portion of money advanced by him on the whole, which exceeded in amount the value of that portion of the cargo actually retained by him." The parties afterwards went to trial again, and the defendant again objected that the contract was entire, and that the action could not be maintained unless the plaintiff could prove an offer to return the corn which he had accepted and received into his store. To overcome this, the plaintiff now offered to prove the existence of the following usage in the port of Boston, viz.: That when a cargo of corn is sold in bulk, lying in the vessel in which it is imported, and the sale is made under a warranty, the purchaser receives and retains so much of the corn as answers the warranty and rejects the residue, which, upon such rejection, becomes the property of the seller. The trial court admitted the evidence, and the plaintiff again had a verdict and judgment, which this time, on appeal, was affirmed. "In the present case," said DEWEY, J., "the usage found by the jury goes directly to establish a rule in contravention of the rules of the common law in relation to rescinding a contract in a case of sale of an unsound article, accompanied by a warranty or induced by false representations. The general rule of law requires the vendee, if he would rescind the sale for such cause, to restore the entire commodity purchased. The local usage proved is that, in a sale of corn under like circumstances, the party may keep so much of the commodity as answers the warranty or representation, and decline taking the residue; that is, he may rescind the contract in part, and, without returning the corn he has received, may recover back the money paid for so much of the

240; *Leggett v. Cooper*, 2 Stark. N. P. 103; *Burton v. Stewart*, 3 Wend. 236; *Voorhees v. Earl*, 2 Hill, 288; *Stevens v. Cushing*, 1 N. H. 17; *Wadlington v. Oliver*, 2 Bos. & Pul. 61; *Oxendale v. Wetherell*, 9 Barn. & Cress. 386;

*Balday v. Parker*, 2 Barn. & Cress. 37; *Shaw v. Badger*, 12 Serg. & R. 275; *Bowker v. Hoyt*, 18 Pick. 553.

<sup>1</sup> 5 Metc. 452; 11 Metc. 186.

## Delivery of Goods

article as does not answer the representation. This usage is certainly not an unreasonable one, and not to be rejected upon that ground. The nature of the commodity, the manner of exposing the article for sale, the price being fixed by the bushel, and the mode of delivery, all alike point out this as a reasonable and convenient usage. We understand the contract to have been an oral one. Such being the case, the admission of the evidence of the usage is not objectionable upon the ground of its being offered to control, vary, or contradict a contract in writing. Nor does the usage contradict any express oral contract made by the parties. Had it done either, it would have presented a very different question. Usages of this character are only admissible upon the hypothesis that the parties have contracted in reference to them. If the parties make express stipulations as to the terms of a sale or the manner of performance of a contract, or state the conditions upon which it may be rescinded, such express stipulations must be taken as the terms of the contract, and they are not to be affected by any usage contrary to them. Looking at the usage relied upon in the present case, and taking it to have been found by the jury to be well established by the proof as a general usage of the dealers in similar commodities in Boston, and finding the same is not repugnant to any express stipulation in the contract of the parties, without any disposition on the part of the court to extend the doctrine of local usage beyond the adjudicated cases, yet we have not felt authorized to reject the evidence offered in the present case." But subsequently, in *Morse v. Brackett*,<sup>1</sup> the case of *Clark v. Baker* was distinguished, and on a very slight pretext a custom in the wool trade by which a purchaser might return a single bale of wool not answering to the warranty, and retain the rest, was rejected.

The contract must be rescinded within a reasonable time; and for this purpose the vendee must examine the goods without unnecessary delay. If goods are purchased in original packages of a wholesale merchant by a dealer, and it is the custom not to examine such goods until opened by the dealer to sell to his customers, an examination made by him when he opens the packages to sell to customers will be considered as within a reasonable time, provided the goods are offered for sale in due course of trade.<sup>2</sup> And a custom of a particular market, that when corn is sold by sample, if the buyer does not on the day it is sold examine the bulk and reject it, he cannot afterwards reject it or refuse to pay the whole price, is reasonable and binding.<sup>3</sup> So, a usage that the proper storing of herring when receiving it, without immediate examination, does not waive objections to quality, is admissible.<sup>4</sup> But a vendor of butter with a warranty cannot set up a local usage that he is not liable to take it back unless the purchaser examines and returns it immediately after delivery.<sup>5</sup>

§ 165. **Delivery of Goods — Passing of Title.** — Evidence of usage to vary the ordinary rules as to the passing of title on the delivery of goods has, in a number of cases, been rejected. Although where goods are sold for cash, and the seller delivers them to the purchaser upon the faith of his paying cash, and immediately demands it, but the buyer refuses to pay, the delivery is not abso-

<sup>1</sup> 98 Mass. 205.

<sup>2</sup> *Doane v. Dunham*, 79 Ill. 131.

<sup>3</sup> *Sanders v. Jameson*, 2 Car. & Kir. 557.

<sup>4</sup> *Henkel v. Welsh*, 41 Mich. 684.

<sup>5</sup> *Marshall v. Perry*, 67 Me. 78.

## Vendor and Purchaser.

lute, but only conditional, and the seller may reclaim, the title never having passed away from him;<sup>1</sup> yet, *where they are sold for cash, to be paid for on delivery, either in cash or commercial paper, and they are delivered without exacting the money or the securities, the delivery becomes absolute, and the title thereby vests in the purchaser.*<sup>2</sup> These rules are established by numerous authorities. Therefore, in *Smith v. Lynes*,<sup>3</sup> a usage of trade that on a sale of goods for cash they are delivered to the buyer without payment or demand of payment, and after a few days a bill of the goods is sent to the buyer and the price demanded, and in the meantime the seller retains a lien on the goods for the price, and that such a delivery is conditional, has been held contrary to law, and invalid;<sup>4</sup> so, also, of a usage of trade that the delivery of an order for flour by the seller to the buyer, the receipt thereof by him, and his presentation to the drawee of it, the seller not being notified of the non-acceptance of the order, is a delivery of the flour sold.<sup>5</sup> "What is delivery," it is said in the last case, "is a question of law, and not of opinion. It is not within the legitimate province of custom to control, or at all interfere with a question of this kind." A usage to sell flour in store by order, and to pass it by the transfer of the order from hand to hand, without actual delivery of the flour, has been recognized in Virginia.<sup>6</sup> Where a seller revokes an order before the goods are delivered, a usage that such an order vests the title *eo instanti* in the purchaser will not avail the latter.<sup>7</sup> And usage cannot convert a voluntary and unqualified delivery, without payment, of goods sold for cash into a mere deposit for examination.<sup>8</sup>

But evidence of custom has been admitted to show that a delivery to a carrier in the usual and ordinary course of business transfers the property to the purchaser, and that the risk from that time is the risk of the purchaser;<sup>9</sup> that in the boot and shoe trade, when shoes are ordered of a manufacturer by a purchaser at a distance, it is the usage of the business, where no special mode of conveyance is mentioned by the purchaser, for the manufacturer to take the goods to a certain point at his own risk, and there deliver them to some regular line of packets running to the purchaser's place of business, and take duplicate bills of lading, and forward one of them to the purchaser by mail, and from that time the delivery is complete and the purchaser takes the risk of loss;<sup>10</sup> that the seller of goods who delivers them to a railroad company, to be first transported

<sup>1</sup> *Osborn v. Gantz*, 6 N. Y. 540; *Ferguson v. Clifford*, 37 N. H. 86; *Refining, etc., Co. v. Miller*, 7 Phila. 97; *Harding v. Metz*, 1 Tenn. Ch. 610; *Gardner v. Clark*, 21 N. Y. 399; *Russell v. Minor*, 22 Wend. 659; *Acker v. Campbell*, 21 Wend. 372.

<sup>2</sup> *Smith v. Lynes*, 3 Sandf. 203; *s. c.* 5 N. Y. 42; *Chapman v. Lathrop*, 6 Cow. 110; *Lupin v. Marie*, 6 Wend. 77; *Furniss v. Hone*, 8 Wend. 247; *The People v. Haines*, 14 Wend. 546; *Carlton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 292; *Hussey v. Thornton*, 4 Mass. 405; *Shindler v. Houston*, 1 Denio, 54; *Buck v. Grimshaw*, 1 Edw. Ch. 144; *Paul v. Reed*, 52 N. H. 136; *Mixer v. Cook*, 31 Me. 340; *Farlow v. Ellis*,

15 Gray, 229; *Bowen v. Burk*, 13 Pa. St. 146; *Pitts v. Owen*, 9 Wis. 152.

<sup>3</sup> 3 Sandf. 203; *s. c.* 5 N. Y. 42.

<sup>4</sup> But see *Haggerty v. Palmer*, 6 Johns. Ch. 437.

<sup>5</sup> *Suydam v. Clark*, 2 Sandf. 133.

<sup>6</sup> *Pleasant v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726.

<sup>7</sup> *South-Western Freight & Cotton Press Co. v. Stanard*, 44 Mo. 71; *Ober v. Carson*, 62 Mo. 200. But see *Furniss v. Hone*, 8 Wend. 247; *Stanton v. Small*, 3 Sandf. 230.

<sup>8</sup> *Haskins v. Warren*, 115 Mass. 514.

<sup>9</sup> *Magruder v. Gage*, 33 Md. 344.

<sup>10</sup> *Putnam v. Tillotson*, 13 Metc. 517.

## Payment.

on their road and then forwarded by steamboat, should take out an internal bill of lading, and send it to the purchaser at or about the time of dispatching the goods.<sup>1</sup> The custom of merchants in Galveston, in dealing with country merchants, that the seller has not performed his duty or parted with the property in the goods until he has boxed them, delivered them to a carrier, and taken a bill of lading, was admitted in a Texas case to ascertain when the property in goods sold to a country merchant passed.<sup>2</sup>

In *Meldrum v. Snow*<sup>3</sup> it appeared that, as beer cannot be removed in warm weather without injury, there was a custom among brewers and retailers for the former to deliver to the latter in the spring as much beer as he expected to sell in the ensuing season, in barrels belonging to the brewer, which are to be returned to him when emptied. The retailer pays for all that he sells during the season, at the price at which it was originally furnished, but if any of it becomes sour or stale, or is lost by the bursting of casks, fire, or other casualty, the loss falls on the brewer; and if any beer remains unsold at the end of the season, the retailer has the right to return it to the brewer, but the latter has no right to take it without the retailer's consent. Payment is never made in advance; the brewer's price never varies, and the profits of retailing belong exclusively to the retailer, who bears all losses of bad debts. It was held that, under these circumstances, beer so delivered was not liable to attachment as the property of the retailer.<sup>4</sup> See also *Priestley v. Pratt*.<sup>5</sup>

§ 166. **Payment.**—Where no time for the payment of goods sold and delivered is fixed by the contract, the price becomes due and payable as soon as the delivery is completed.<sup>6</sup> But where a uniform custom and course of dealing on the part of the seller to demand payment at the close of each month is shown, and this custom is known to the purchaser, an implied contract arises that credit shall be given until the close of the month for all materials delivered during the month.<sup>7</sup>

The possession, by the acceptor, of a draft drawn with a blank for the name of the payee,<sup>8</sup> or the production of defendant's order in favor of a third person,<sup>9</sup>

<sup>1</sup> *Johnson v. Stoddard*, 100 Mass. 306.

<sup>2</sup> *Woods v. Hall*, 44 Texas, 633. And see *Haggerty v. Palmer*, 6 Johns. Oh. 437; *Keeler v. Field*, 1 Paige, 312; *Furniss v. Hone*, 8 Wend. 247.

<sup>3</sup> 9 Pick. 441.

<sup>4</sup> "It being beneficial to the community to introduce the use of beer," said the court, "public policy would justify us in favoring the custom."

<sup>5</sup> *Ante*, p. 201. And see *Doyle v. Lasher*, 18 Upper Canada C. P. 263.

<sup>6</sup> *Street v. Blay*, 2 Barn. & Adol. 456; *Howdy v. Melaine*, 10 Bing. 432; *Rugg v. Minnett*, 11 East, 210; *Chambers v. Miller*, 13 C. B. (N. S.) 125; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Castle v. Playford*, L. R. 7

Exch. 98; *Robbins v. Harrison*, 31 Ala. 160; *Metz v. Albrecht*, 52 Ill. 491; *Fitzpatrick v. Fain*, 3 Coldw. 15; *South-Western Freight Co. v. Plant*, 45 Mo. 517; *Coil v. Willis*, 18 Ohio, 23; *Davis v. Adams*, 18 Ala. 264; *Cassell v. Backrack*, 42 Miss. 56; *Goldsmith v. Bryant*, 26 Wis. 34; *Brehen v. O'Donnell*, 34 N. J. L. 408; *Miller v. Jones*, 66 Barb. 148.

<sup>7</sup> *Phoenix Mutual Ins. Co. v. Batchen*, 6 Bradw. 621. And see *Salmon Falls Man. Co. v. Goddard*, 14 How. 446; *Austin v. Birmingham*, 31 Vt. 577.

<sup>8</sup> *Close v. Fields*, 9 Texas, 422.

<sup>9</sup> *Zeigler v. Gray*, 12 Serg. & R. 42; *Blount v. Starkey*, 1 Tayl. 110; *s. c.* 2 Hayw. (N. C.) 75; *In re Penny*, 14 La. An. 194; *Weidauer v. S. Weigart*, 9 Serg. & R. 335.

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is *prima facie* evidence that the draft had been in circulation, and had been taken up by the acceptor, or of payment according to its tenor. But this presumption may be rebutted by proof showing the possession as acquired without payment—as, by a custom to leave drafts with the payee for acceptance.<sup>1</sup> So, in an action by a bank against one of its customers, it is competent to show the custom of the bank to enter payments on account of an indorsement on the indorser's bank-book, in order to rebut the presumption that such an entry was a deposit, and not a payment.<sup>2</sup> And a custom for the merchants in a certain city to retain the notes and bills of their country customers, paid by them, until a settlement at the end of the year, is admissible.<sup>3</sup> The presumption that making a negotiable note extinguishes the original demand, may be overcome by proof of a contrary usage.<sup>4</sup>

The burden of proof of payment of a debt is upon the debtor. As a general rule, the mere fact of mailing the amount of money due the creditor, in a letter addressed to him at his place of business or his residence, in the absence of any directions by him to so remit it, is not *prima facie* evidence of payment;<sup>5</sup> and this is so, even though the letter was registered.<sup>6</sup> But, to overcome this presumption, the debtor may show either an express direction from the creditor to so remit, or a usage and course of dealing from which such an assent may be inferred. Then the transmission is at the risk of the creditor. Thus, it was said by Lord KENYON in an old case: "Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received. It was so determined in the Court of Chancery forty years since."<sup>7</sup>

In the absence of contract, there is no implied agreement on the part of the purchaser to pay the expenses of packing the goods, or otherwise putting them in order for delivery.<sup>8</sup> But evidence of usage is competent for the purpose of showing which party is chargeable with the expense of packing, wrappers, and cases;<sup>9</sup> and in an action between a manufacturer of picture-frames and a dealer in them, the dispute being as to which should pay freight on frames sold to the latter by the former, evidence of a usage between manufacturers and dealers in the place where the goods were made and sold that the manufacturers should pay freight, was held admissible.<sup>10</sup>

§ 167. Interest—When allowed by Custom.—Interest, without an agreement therefor, is not allowed by law upon unliquidated accounts for goods, wares,

<sup>1</sup> *Close v. Fields*, 9 Texas, 422. And see *Alvord v. Baker*, 9 Wend. 323; *Rice v. Isham*, 4 Abb. App. Dec. 37.

<sup>2</sup> *Sherer v. Easton Bank*, 33 Pa. St. 135.

<sup>3</sup> *Remy v. Duffee*, 4 Ala. 365. And see *Winans v. Hassey*, 48 Cal. 634.

<sup>4</sup> *Varner v. Nobleborough*, 2 Me. 121.

<sup>5</sup> *Crane v. Pratt*, 12 Gray, 349; *Walter v. Haynes*, Ryan & M. 149; *Wakefield v. Lithgow*, 3 Mass. 249.

<sup>6</sup> *First National Bank v. McManigle*, 69 Pa. St. 156.

<sup>7</sup> *Warwicke v. Noakes*, Peake N. P. 68; *Hawkins v. Rutt*, Peake N. P. 187; *Gurney v. Howe*, 9 Gray, 404.

<sup>8</sup> *Cole v. Kerr*, 20 Vt. 21; *Burr v. Williams*, 23 Ark. 244.

<sup>9</sup> *Cole v. Kerr*, *supra*; *Robinson v. United States*, 13 Wall. 363.

<sup>10</sup> *Howe v. Hardy*, 106 Mass. 329.

## Interest Allowed by Custom.

and merchandise;<sup>1</sup> for work done,<sup>2</sup> or on book-accounts.<sup>3</sup> In *Henry v. Risk*,<sup>4</sup> decided in the Supreme Court of Pennsylvania in 1788, the court refused to allow evidence of a custom of the trade to charge interest in such cases. The action was brought for goods sold and delivered in the city of Philadelphia, the plaintiff having charged interest upon his account after six months' credit. The right to do this was the only question in the cause, and the plaintiff's counsel offered to prove by witnesses that it was the custom of the trade in Philadelphia to allow interest under such circumstances. But McKean, C. J., ruled that, interest not being recoverable on such accounts at law, the custom was not admissible, saying: "The point has been repeatedly determined otherwise in this court as well as in the courts of England; and, therefore, witnesses cannot be admitted to contradict the established principles of the law." But this decision has been long overruled in that State, and the practice of the merchants of Pittsburg and Philadelphia to charge interest on their accounts after six months is now judicially noticed in the Pennsylvania courts.<sup>5</sup>

And, in a number of cases, evidence of usage has rendered charges for interest under such circumstances recoverable at law.<sup>6</sup> In one of these it was said: "From the practice which has generally obtained in this State, from the known usage and custom of Mr. Raymond [the creditor], as well as of other merchants, to cast interest on their accounts after six months, we think there was an implied contract on the part of Dr. Isham to pay interest after the usual time of credit."<sup>7</sup> In another: "We do not think the charge of interest on any part of the account objectionable. The plaintiff proved that the defendant was one of his customers, and that he always charged interest on his accounts after ninety days. The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings are supposed to act with reference to that custom."<sup>8</sup> In another: "Although,

<sup>1</sup> *Yonqua v. Nixon*, 1 Pet. C. Ct. 224; *Reid v. Rensselaer Glass Factory*, 3 Cow. 393; 5 Cow. 589; *Adams Express Co. v. Milton*, 11 Bush, 49; *Brady v. Wilcoxson*, 44 Cal. 277; *Haunhurst v. Hovey*, 26 Vt. 544; *Gilman v. Vaughan*, 44 Wis. 646; *Marsh v. Frazer*, 47 Wis. 149; *Tucker v. Ives*, 6 Cow. 193; *Kane v. Smith*, 12 Johns. 156; *Consequa v. Fanning*, 3 Johns. Ch. 587; *McKnight v. Dunlop*, 4 Barb. 36.

<sup>2</sup> *Henry v. Risk*, 1 Dall. 265; *Harrison v. Handley*, 1 Bibb, 443; *Murray v. Ware*, 1 Bibb, 325; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Brewer v. Tyringham*, 12 Pick. 547; *Boyle v. St. James' Church*, 7 Wend. 178; *Goff v. Rehoboth*, 2 Cush. 475; *Stimpson v. Green*, 13 Allen, 326; *Palmer v. Stockwell*, 9 Gray, 237; *Sprague v. Sprague*, 30 Vt. 483; *Adams Express Co. v. Milton*, 11 Bush, 49; *Amee v. Wilson*, 22 Me. 116; *Shipman v. The State*, 44 Wis. 458.

<sup>3</sup> *Day v. Lockwood*, 24 Conn. 186; *Crosby v. Mason*, 32 Conn. 432.

<sup>4</sup> 1 Dall. 265. And see *Temple v. Belding*, 1 Root, 314.

<sup>5</sup> *Koons v. Miller*, 3 Watts & S. 271; *Watt v. Hatch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 Pa. St. 346. And see *Shewel v. Givan*, 2 Blackf. 312.

<sup>6</sup> *Eddowes v. Hopkins*, Doug. 361; *Knox v. Jones*, 2 Dall. 193; *Koons v. Miller*, 3 Watts & S. 271; *Rensselaer Glass Factory v. Reid*, 5 Cow. 611; *Esterly v. Coole*, 3 N. Y. 502; *Bispham v. Pollock*, 1 McLean, 411; *Liottard v. Graves*, 3 Caines, 216; *Selleck v. French*, 1 Conn. 32; *Watt v. Hatch*, 25 Pa. St. 411; *Goff v. Inhabitants*, 2 Cush. 475; *Newell v. Griswold*, 6 Johns. 44; *Sammis v. Clark*, 13 Ill. 544; *Hitt v. Allen*, 13 Ill. 592; *Veiths v. Hagge*, 8 Iowa, 163; *Righton v. Blake*, 1 Brev. 159; *Knight v. Mitchell*, 3 Brev. 506; *Pearson v. Grice*, 8 Fla. 214; *Lamb v. Klaus*, 30 Wis. 94; *Morris v. Allen*, 14 N. J. Eq. 44; *Goodman v. Clarke*, 65 Me. 280; *Kermott v. Ayer*, 11 Mich. 181; *Comstock v. Smith*, 20 Mich. 338; *Barclay v. Kennedy*, 3 Wash. C. Ct. 350. And see *ante*, § 52.

<sup>7</sup> *Raymond v. Isham*, 8 Vt. 263.

<sup>8</sup> *McAllister v. Reab*, 4 Wend. 483.



## Negligence.

as a general principle, running accounts do not draw interest, yet if a merchant has been in the general practice of charging interest after a limited period of credit, those who deal with him with a knowledge of that fact are bound to pay interest from the expiration of such period; and their liability is the same if they have been in the habit of settling their accounts with him, in which such interest has been charged and allowed."<sup>1</sup> In another, which was a suit on a book-account, it was said: "Evidence may be introduced to show that by the agreement or understanding of the parties interest may be charged. Proof of custom is also allowed. As there is no evidence on the point, it is not a case for interest."<sup>2</sup>

Likewise, while on such charges as a forwarding merchant's services for freight, wharfage, and storage, interest is not by law allowed,<sup>3</sup> usage may allow it.<sup>4</sup> And where a banker and his customer have carried on their business, as to interest, for a number of years in a particular way, it will be assumed that there is an agreement to that effect, and the principle involved will be held binding in any subsequent disagreement between them.<sup>5</sup> A commission merchant is liable for interest on a balance in his hands in favor of his principal, in the absence of proof of a usage of trade to the contrary;<sup>6</sup> and the custom of merchants as to when open accounts become due is evidence of the time when the Statute of Limitations begins to run.<sup>7</sup> In New Jersey, by usage, interest is collected on judgments by an indorsement on the execution.<sup>8</sup>

## X. MISCELLANEOUS.

§ 168. *The Question of Negligence as affected by Custom.*—Judge STORY,<sup>9</sup> in stating the degrees of negligence and the measure of diligence in different relations, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age; so that, although it may not be possible to lay down any very exact rule applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live. It will thence follow that in different times and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle; so that it may happen that the same acts which in one country or in one age may be deemed negligent acts, may at another time or in another country be justly deemed an exercise of ordinary diligence. It is important to attend to this consideration, not merely to deduce the implied obligations of a bailee in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it is customary to leave flocks to roam at large by night, it would

<sup>1</sup> *Reab v. McAllister*, 8 Wend. 109.

<sup>2</sup> *Crosby v. Mason*, 32 Conn. 483.

<sup>3</sup> *Trotter v. Grant*, 2 Wend. 213.

<sup>4</sup> *Meech v. Smith*, 7 Wend. 315.

<sup>5</sup> *Moses v. Salt*, 32 Beav. 289; *Clancarty v. Latouche*, 1 Ball & B. 420.

<sup>6</sup> *Price v. McConico*, 44 Ala. 627.

<sup>7</sup> *Hendricks v. Robinson*, 56 Miss. 694;

*Eminger v. Henderson*, 33 Miss. 449.

<sup>8</sup> *Erie R. Co. v. Ackerson*, 33 N. J. L. 34.

<sup>9</sup> *Story on Bail*, § 11.



How Affected by Custom.

not be a want of ordinary diligence to allow a neighbor's flock, which is deposited with us, to roam in the same manner. But if the general custom were to pen such flocks at night in a fold, it would doubtless be a want of such diligence not to do the same with them. In many parts of America, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is usual to leave barns, in which horses and other cattle are kept, without being under lock by night. But in our cities, where the danger is much greater and the temptation more pressing, it would be deemed a great want of caution to act in the same manner. If a man were, in many country towns, to leave his friend's horse in his field, or in his open barn all night, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if in a large city the same want of precaution were shown, it would be deemed in many cases a gross neglect. If robbers were known to frequent a particular district of country, much more precaution would be there required than in districts where robberies were of very rare occurrence. What, then, is usually done by prudent men in a particular country in respect to things of a like nature, whether it be more or less in point of diligence than what is exacted in another country, becomes in fact the general measure of diligence. And the customs of trade and the course of business have also an important influence. If, in the course of a particular trade, particular goods — as, for instance, coals — are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger or other person having the custody might not be responsible for the loss, although for a like loss of other goods not falling under a like predicament he might be responsible. If a chaise were left during the night under an open shed, and were stolen, the bailee might not be liable for the loss if such was the usual practice of the town or place, and yet he might be liable if greater precautions were there usually taken. In short, diligence is usually proportioned to the degree of danger of loss; and that danger is, in different states of society, compounded of very different elements. Men intrusted with money might at some times and in some places be required to go armed, when at other times and in other places such a precaution would be deemed wholly unnecessary." In *Vaughan v. Menlove*,<sup>1</sup> VAUGHAN, J., said, speaking of the evidence of negligence: "The conduct of a prudent man has always been the criterion for the jury in such cases; but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been whether he has pursued the course which a prudent man would have pursued under the same circumstances." "They must take," said BEST, J., in an old case, speaking of bailees for hire, "the same care of property intrusted to them that a prudent man would take of his own property."<sup>2</sup>

§ 169. Same — As affecting the Duties of Common Carriers. — In *Cass v. Boston and Lowell Railroad Company*,<sup>3</sup> the plaintiff sued to recover the value of a tub of sugar which had been consigned to him, and which, a few days after he had received notice of its arrival at the defendant's depot at Boston, he paid the

<sup>1</sup> 3 Bing. N. C. 468.

<sup>2</sup> *Batson v. Donovan*, 4 Barn. & Ald. 30. And see *Lodwicks v. Ohio Ins. Co.*, 5 Ohio,

436; *Lawrence v. McGregor, Wright*, 193;

*Cook v. Champlain Transp. Co.*, 1 Denio, 92.

<sup>3</sup> 14 Allen, 448.

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Negligence.

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freight upon and received an order for its delivery. Upon calling for the sugar at the freight depot, he was informed, after search for it, that it could not be found, and had probably been stolen. On the trial, it appeared that at the time when the sugar was discovered to be missing it had been about eight days in the depot, where a number of men were employed in attending to the unloading and delivery of freight, and the defendants offered to prove that the same care was exercised in relation to this property which was usually exercised in Boston by other railroad corporations in the case of similar property. This evidence the trial judge excluded, and the jury returned a verdict for the plaintiff. On appeal to the Supreme Judicial Court of Massachusetts, the judgment was reversed, the court saying: "If the defendants exercised due and ordinary care in the custody of the property, they cannot be charged for its loss. What constituted such care was a question of fact, to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated. The standard of ordinary care varies, necessarily, in different localities. One degree of diligence would be required for the city and a less or greater for the country, depending on a great variety of circumstances. The defendants offered to prove that there was exercised by them in relation to this property that care which other railroad corporations in Boston usually exercised in relation to such property. The court excluded this evidence, and on this ground the exceptions are well taken." *Lichtenhein v. Boston and Providence Railroad Company*<sup>1</sup> was a suit against the defendants as warehousemen, for the non-delivery of property in their charge, the defence being that it had been fraudulently taken from them without any negligence on their part. On the trial, it was shown that when merchandise was delivered from the depot, the name of the person to whom it was delivered was inserted, in pencil, on the margin of a book kept by the defendants, and that this was the only evidence taken by the defendants of the delivery. The plaintiff contended that this was a careless method of doing business, and offered evidence to show that all the other railroad companies in that city took written receipts from parties receiving property from them. This evidence was excluded, and the defendants had a verdict, which was affirmed on appeal. The Supreme Court refused to consider the ruling as material, for the reason that the jury had found that the property of the plaintiff had been abstracted from the defendants' custody, and not that it had been delivered to the wrong person. Had the latter been the company's defence, the case would have been different. "As to the ruling of the presiding judge excluding the testimony offered by the plaintiff tending to show that other railroad companies require written receipts from those to whom goods are delivered from the warehouse of the company, and that such mode was a better one than that of the defendants, which was writing the name, in pencil, of the party who received an article, in the margin of the book, against the article delivered, we are of opinion that it furnished no ground for a new trial. If the case had been one of actual delivery to a third person by an agent of the defendants, and the question had been whether the mode of defendants furnished equal security for ascertaining to whom the article had been delivered, the question whether a general usage of railroads in this matter might not have been admis-

<sup>1</sup> 11 Cush. 70.

Common Carriers.

sible to show negligence, might have required further consideration. But to the present case the proposed evidence was wholly irrelevant. There is nothing in the case to show that any delivery of the property took place as between the defendants and any individual. If their mode had been like that of other companies, yet no receipt would have been taken by them, because, upon their hypothesis, there had been no delivery. The position of the defendants, on the contrary, is that the goods were fraudulently abstracted from their custody." In *Loveland v. Burke*,<sup>1</sup> the plaintiffs employed the defendant to transport a hogshead of molasses from Boston to their store in Somerville, and in delivering the hogshead at the store, while it was being rolled on skids from the wagon to the sidewalk, one of the skids broke, and the contents of the hogshead were lost. The skids were furnished by the plaintiffs at the defendant's request, and the breaking was caused by a piece having been sawed from the under part of it. On the trial, the defendant offered to prove that it was the universal and well-known custom in Somerville for grocers to keep and furnish skids whereon to remove heavy articles from common carriers' wagons to their stores, and for carriers not to furnish skids, and that it was the plaintiffs' duty in this case to furnish them. He likewise contended that the skids appeared to him to be suitable, and that the defect was unknown to him, and requested an instruction that if the jury should find that it was the duty of the plaintiffs to furnish proper skids upon which to receive the hogshead, and that those so furnished appeared to be suitable, he was not liable. This instruction was refused, and the jury were told that it was the duty of the carrier to deliver the property on the premises of the plaintiffs, using proper means and instruments; that the mere fact that the usage was that the grocers should furnish the skids did not alter the duty of the defendant to make a proper delivery; and that he was bound to use proper skids, even though they were furnished by the plaintiffs. "The plaintiffs were not warrantors that the skids were sufficient to carry the hogshead to the sidewalk on the plaintiffs' premises. If there was a latent defect in the skids, known to the plaintiffs and not known to the defendant, and not observable by ordinary skilful observation before using, the defendant would not be liable. The question as to usage, though of some importance, is not decisive of the case; but the previous considerations must also be regarded. The mere fact that the skids were furnished in compliance with usage by the plaintiffs does not alter the period when the delivery is completed. The period of completed delivery by the carrier is the same, whether the skids are to be furnished by the plaintiffs or by the defendant." The Supreme Court held this charge to be wrong. "The jury should have been instructed," said AMES, J., "that if they were satisfied of the existence of a long-continued, established, and notorious usage for grocers in that locality to furnish the planks or wooden supports for unloading at their shops heavy articles from carriers' wagons, and if the damage in this instance was occasioned by defects in the appliances furnished for that purpose by the plaintiffs, especially if those defects were not so manifest that the defendant saw, or with reasonable attention would have seen them, the action could not be maintained. A usage to furnish the skids must mean suitable and proper skids, capable, with reasonable use, of sustaining the weight of the articles which were to rest upon them." In another case, a railroad com-

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pany was sued for a personal injury received by the plaintiff through the carelessness of one of its servants in wheeling a crate of crockery along the platform of its freight-house. The plaintiff had gone to the freight-house to receive some goods of his employer, and while attending to this business was injured by the crate of crockery, which was being moved by one Monneghan, a servant of the defendants, to another wagon. The crate had been in the freight-house for a day preceding, awaiting the owner, and the defendants contended that their duty was then at an end, and that they were not liable for the subsequent unauthorized act of Monneghan in moving it to the wagon, nor for any damage caused thereby. On the trial, the plaintiff introduced evidence to show that it was the ordinary custom of Monneghan to move heavy articles from inside the freight-house to the platform when they were called for, and deliver them there; and the judge instructed the jury that "if it was Monneghan's ordinary custom, when heavy freight like this crate of crockery was called for by the consignees after it had been deposited in the freight-house, to remove it to the platform outside, then this would become the service of the defendants, even if their duty had ceased as to the delivery of the goods." In the Supreme Court this instruction was held incorrect. "It is difficult to see," said SMITH, J., "how, after the defendants' duty had ceased as to the delivery of freight, any custom or practice of Monneghan's in assisting consignees in removing or loading their goods can affect the defendants. The defendants are only responsible for their servant's acts when acting within the line of his duty, and within the line of their duty to their consignees. When that duty has ended, they are no more responsible for his acts and doings than for the acts and doings of any other person."<sup>1</sup> Where goods in the hands of a carrier were injured while he was descending a river with two flat-boats lashed together, the fact that this was a customary mode of navigating the river was held relevant on the question of negligence.<sup>2</sup> And a custom of the officers of a boat on the river to notify passengers of their arrival at their places of destination will render the carrier liable for taking a passenger beyond his destination, who had failed to land at the proper place through not receiving the customary notice.<sup>3</sup> Where a railroad company was sued for an injury to a passenger, received while alighting from the train at the depot, and the negligence charged was the failure of the train to stop a sufficient length of time to enable the plaintiff to alight in safety, evidence of the usual and customary period of the train's stopping at the place was admitted. "We think it was proper," said the Supreme Court, "for the purpose of showing what the defendants had considered a reasonable time to be allowed the passengers to leave at that station; and if the time allowed for that purpose on this occasion was shorter than the usual and customary time, it would tend somewhat to show that a reasonable time was not allowed."<sup>4</sup> In an action for an injury to a passenger, one of the questions being whether a passenger is bound to wait in the depot until the arrival of the train, or may go onto and stand upon the platform while it approaches, the usage of other passengers there is relevant.<sup>5</sup>

<sup>1</sup> Jewell v. Railway Co., 55 N. H. 84.

<sup>2</sup> Johnson v. Lightsey, 34 Ala. 169.

<sup>3</sup> Carson v. Leathers, 11 Cent. L. J. 157.

<sup>4</sup> Miller v. Naugatuck R. Co., 21 Conn. 557.

<sup>5</sup> Caswell v. Boston, etc., R. Co., 98 Mass. 194.

Bailments.

§ 170. Same.—As affecting the Question of Diligence in other Bailments.—In *Maxwell v. Eason*,<sup>1</sup> the action was to recover the value of a quantity of cotton delivered by the plaintiff to the defendant, the owner of a cotton-gin, and which was destroyed by fire through, as was alleged in the declaration, the negligence of the defendant. The defendant denied that he had been guilty of negligence, and the evidence showed that the fire was caused by the falling of an open lamp among the cotton from the hands of the defendant's son, while proceeding, by his order, to hang up in the gin-house a pair of steelyards. On the trial, one of the plaintiff's witnesses, an owner of a gin-house in the same county, was asked the following questions: "What is the general custom of gin-holders in regard to carrying light about their gin-houses when they contain cotton? What is your custom in this respect? Is it customary among gin-holders to carry, or permit to be carried, in their gin-houses, when they contain cotton, an open lamp with oil, to afford light?" These questions were excluded by the trial judge, and this, on appeal, the Supreme Court held to be error. "The question of fact for the determination of the jury," said SAFFOLD, J., "was whether the defendant used ordinary care, or that degree of caution which is due from a man of common prudence in the same situation or in like employment. The necessary and usual caution for the security of gin-houses, and how far it is deemed prudent to risk fire in or near them, is not presumed to be equally known to all persons. If it were so to be regarded, the evidence was inadmissible. But it is presumed prudent gin-holders have something like a uniform practice in this respect. If so, every one who sends his cotton to a gin is entitled to expect the same care and prudence for the security of his property. Then, to enable the jury to decide whether this defendant used that degree of care which is usual with a majority of prudent men in the same business or trade, evidence of the custom of such persons generally was relevant and admissible, and should have been permitted to go to the jury. The acts of the defendant's son, in his immediate employment and under his direction, can only be regarded as the act of the defendant himself. The evidence respecting the individual custom of the witness as a gin-holder, unless it corresponded with the general usage, was immaterial; but the usual custom of prudent men in that respect, including that of the witness, was legal testimony." *Brown v. Hitchcock*<sup>2</sup> somewhat resembles this case. The plaintiff delivered to the defendant a quantity of palm-leaf to be worked into hats, or returned when called for; but when the plaintiff demanded it, it was found to be spoiled by heat and mould, occasioned from the palm-leaf not having been taken out of the sacks in which it was delivered, and exposed to the air. On the trial of an action for the loss, the defendant's evidence was to the effect that he kept his own palm-leaf stored in sacks, and no injury had resulted therefrom, and that the plaintiff's palm-leaves were damp when he received them. It was held proper for the plaintiff to show that it was usual and customary among dealers to put leaf in sacks in a damp state for market that it was usually bought and sold in that way, and that it was the custom of manufacturers to take the leaf from the sacks and expose it to the air. So, a miller employed to grind grain must use the diligence of millers of neighboring mills.<sup>3</sup> Where the question is as to the

<sup>1</sup> 1 Stew. 514.

<sup>2</sup> 28 Vt. 452.

<sup>3</sup> *McKibben v. Bakers*, 1 B. Mon. 122. As to the custom of storing, as affecting the lia-

bility of a warehouseman for goods stolen from his warehouse, see *Shenowith v. Dickinson*, 8 B. Mon. 156.

## Negligence.

diligence of an agent in making a sale, evidence of usage is competent;<sup>1</sup> and, on a similar principle, where an agent was sued by his principal for the sum of \$20,000 belonging to the latter which he had collected, and his defence was that it had been stolen from him, and it appeared that the money was at the time of the loss kept in an iron safe in a room usually occupied by two persons, but then left unguarded and not very secure, it was held competent for him to show that custodians of money do not usually look to doors or windows for protection, but to their vaults and safes.<sup>2</sup> The presentment of a check may be shown by usage to be in time, which without such proof would be deemed to be negligently delayed.<sup>3</sup> And where the question was whether a guest at a hotel had been guilty of negligence in leaving the key in the door of his room, in which was a large sum of money, evidence of the usage of guests at the hotel of leaving keys in the doors of their rooms was held to be relevant.<sup>4</sup>

In like manner, it is universally held that the drivers of horses and carriages on the highways,<sup>5</sup> and the masters or pilots of ships and steamboats on the waters,<sup>6</sup> must follow the customary mode of passing each other, and a failure to comply with such custom will amount to negligence.

§ 171. Same—As affecting the Contributory Negligence of a Servant.—

Several recently reported cases discuss the force of a custom on the question of the contributory negligence of a servant in an action against the master for injuries received while in his employ. In *Berg v. Chicago, etc., Railway Company*,<sup>7</sup> the plaintiff, who was an employee of the defendant company, engaged as a trackman, removing snow and ice from the track in the depot yard, was injured by a car which, detached from the locomotive, had been shunted along the track on which he was working. There was a brakeman on the car, who testified to having called out to the plaintiff as the car approached him, but the latter did not hear him. On the trial, the defendant offered evidence, which was allowed, of a custom, known to the plaintiff, that in switching cars in the depot yard it was not the duty of the railway company to have a brakeman or other person upon each train of cars in motion, or upon each car which was being moved separately, to give warning to the men at work in the yard of approaching danger, but that a car might be sent along any of the tracks, attached to or disconnected from a locomotive, as the exigencies of the business might require, without any one upon it, and in such case the men employed in the yard must look out for themselves. That is to say, that it was not, *per se*, negligence of the company or its employees thus to move a car in its

<sup>1</sup> *Bradford v. Drew*, 5 Metc. 188.

<sup>2</sup> *Wright v. Central R. Co.*, 16 Ga. 38.

<sup>3</sup> *Turner v. Bank of Fox Lake*, 4 Abb. App. Dec. 434; 23 How. Pr. 399; *Johnson v. Bank of North America*, 5 Robt. 554; 45 N. Y. 67; *Smith v. Miller*, 52 N. Y. 545; 42 N. Y. 171; *Kelty v. Second National Bank*, 52 Barb. 328.

<sup>4</sup> *Berk-hire Woollen Co. v. Proctor*, 7 Cush. 417. See *Barber v. Brace*, 3 Conn. 9.

<sup>5</sup> *Leame v. Bray*, 3 East, 593; *Tueley v. Thomas*, 8 Car. & P. 104; *Bolton v. Calder*, 1 Watts, 360.

<sup>6</sup> *Morrison v. General Steam Nav. Co.*, 8 Exch. 733; *General Steam Nav. Co. v. Morrison*, 13 C. B. 581; *Barrett v. Williamson*, 4 McLean, 595; *Myers v. Perry*, 1 La. An. 353; *The City of Washington*, 92 U. S. 31; *The Clement*, 2 Curt. 363; *Jones v. Pitcher*, 3 Stew. & P. 135; *Boyce v. The Empress*, 3 West. L. J. 174; *Drew v. The Chesapeake*, 2 Doug. 33; *Harding v. The Maverick*, 5 L. R. 106; *Domingo v. Merchants' Ins. Co.*, 19 La. An. 481; *Sampson v. Hand*, 6 Whart. 324.

<sup>7</sup> *Sup. Ct. Wis.*, November, 1880.



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yard unattended, and the peril of injury from a car so moving was, by the custom, one of the perils of the service, the risk of which was upon the servant. The Supreme Court, while holding the custom fully proved and properly admitted, ruled that it was not applicable to the case at bar. "The custom," said LYON, J., "has little significance in this case, for the reason that there was a brakeman on the car, who saw the plaintiff at work on the track upon which the car was moving, a sufficient time before the injury to have stopped the car before it reached the plaintiff, or to have warned him of its approach. The custom does not relieve the defendant of liability for the negligence of its other employees. It did not relieve the brakeman of the duty of stopping the car or warning the plaintiff of its approach, or cast upon the plaintiff the risk of his failure to do so. No such custom was referred to in the question proposed, and none was proved. On the contrary, the evidence tends to show that the brakeman should have given the trackmen some notice or warning of the approach of the car. On grounds of public policy, a custom which would permit the brakeman to let the car run upon the trackmen, when he knew their peril and could easily avoid it, can hardly be sustained as a valid custom." In *Hughes v. Winona, etc., Railroad Company*,<sup>1</sup> the plaintiff was employed as a night-brakeman in the defendant's yard where trains were made up. Among other things, it was his duty to assist in making up trains and to couple cars. For the latter purpose it was necessary for him to go between cars in motion. It was defendant's custom, when necessary, to have the fire-boxes of its engines cleaned of ashes at any place upon the track in the yard where an engine chanced to stand, when the engineer or fireman thought best to take them out. The ashes were usually allowed to remain where they dropped upon the track, from one to four hours, until removed or scattered by men employed by defendant to keep the yard in order. In attempting to couple two cars, one of which was in motion, the plaintiff stepped upon a heap of ashes which had been left upon the track in the manner above mentioned, and, the ashes being wet, he slipped and fell, and the moving car passed over his leg, crushing it so that it had to be amputated. On the trial, the jury were instructed that a servant continuing in a service with full knowledge of its dangers assumed all the risks, and could not recover damages for an injury, even though the mode of conducting the business was careless; that if the custom of the defendant in disposing of the ashes was notorious, so that the plaintiff would be deemed to have knowledge of it, he would be considered in law to have voluntarily assumed all the risks incident to that way of managing the business, and could not recover even though the custom was unsafe. The instructions were approved on appeal. "Their effect, as applicable to the facts of this case," said the Supreme Court, "is that if an employer's unsafe and careless custom of conducting business is open to observation, so that it can be reasonably observed by the senses, and the employee has ample and reasonable means of using his senses for the purpose of observing the custom, it is his own fault and negligence if he does not observe it, and he stands upon the same footing as if he had actual knowledge of the custom referred to; so that the risk to him from such custom is his own, and not that of the employer. This is about the same thing as saying that the employee must make reasonable use of his senses to avoid danger and injury in

<sup>1</sup> Sup. Ct. Minn., September, 1880.

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Negligence.

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the course of his employment; or, in other words, that he must not be negligent. \* \* \* Under the instructions of the court, the jury, in rendering a verdict for the defendant, must be taken to have found that the defendant was not guilty of negligence in depositing the ashes upon the track and suffering them to remain there; or that if in so doing it was guilty of negligence, then the plaintiff was, or ought to have been, cognizant of defendant's custom to so deposit ashes upon the track and suffer them to remain there for a time, and therefore took the risk of such negligence upon himself by continuing in defendant's employ." In *Flannagan v. Chicago, etc., Railroad Company*,<sup>1</sup> the plaintiff's injury was received while climbing on a car which was being taken to the company's repair-shops for inspection and repair. The trial judge consulted the plaintiff, for the reason that it was quite apparent from his duties that he must have known that the service of taking the defective cars to the repairing-shops was more hazardous than the usual employment of a brakeman on the road; that he knew it was the custom in the yard to take all cars which had been used for bringing ore to Escanaba down to the repair-shops for inspection; knew it frequently happened that cars which were out of repair were taken down there together with cars which did not need repair, and that a knowledge of these facts imposed upon him more care than would have been incumbent upon him under other circumstances. Consequently the judge held that where the plaintiff sought to climb upon cars which he was thus engaged in handling, and which were liable to be out of repair, he was bound to realize that fact, and not attempt to step upon the jaw-brace without looking to see where he was placing his foot, and not take it for granted that the brace was there in its place because braces were usually on the cars. In the Supreme Court, the force of this argument was admitted by COLE, C. J., who delivered the opinion of the court, but the judgment was affirmed on the ground that there was no sufficient evidence of negligence on the part of the company to take the case to the jury. "When this case was here on a former appeal," said the court, "it was decided that no negligence on the part of the company could be predicated upon the delay in removing the broken car from the end of the spur-track, where it was broken. It was also decided that the law did not impose upon the defendant the duty of repairing the car upon the track where it was broken, but that it had the clear right to remove it to its repair-yard, where such work was usually attended to. These propositions would seem to be so well founded in reason and common sense as to need no illustration or argument to support them, for a moment's reflection must satisfy any mind that it would be practically impossible for a railroad company to repair its broken cars along the line of its road where they might happen to be wrecked. Machinery, appliances, together with skilled workmen, are generally needed to make repairs; and hence there is a necessity for removing broken cars to shops or yards where these can be secured. It is true, the testimony shows that the broken brace on this car might have been repaired on the track where it stood; but it appears the company had a rule or custom of sending all cars, after they were unloaded of ore, down to the repair-shops for inspection. This would seem to be a reasonable way of doing business, and the custom was well known to the plaintiff." So, in an action by a brakeman against a railroad company to recover damages for

<sup>1</sup> Sup. Ct. Wis., November, 1880.

Master and Servant.

a personal injury while in its employ, occasioned by a want of best on a side-track on which he went, where the company offered to prove that it was customary for railroad companies to have in use unballasted side-tracks, which evidence the court refused, this was held to be error.<sup>1</sup> So, in an earlier case,<sup>2</sup> the plaintiff's intestate was a brakeman, and was killed while uncoupling cars when in motion. The train-men, of whom he was one, had established a custom of uncoupling the train while in motion, at this particular station where he was killed, for their own convenience. The court held that no recovery could be had for injuries received while performing such a duty, because the deceased must be regarded as having assumed the risk incident to such a customary, although hazardous employment. "If," said DAY, C. J., "the deceased had not himself contributed to the establishing of the custom, and remained in defendant's employ with knowledge of its existence, without complaint or protest, and voluntarily taken upon himself the particular act which occasioned his death, our conclusion would be different." On the other hand, in a New York case,<sup>3</sup> where a brakeman was killed while riding on the locomotive, and the rules of the company prohibited brakemen from leaving their posts while the train was in motion, but the evidence showed that it was customary on the road for brakemen to ride on the engine, and it did not appear that the deceased was aware of the company's rules, it was held that his non-observance of them was not a violation of duty; that it could not be assumed that his duty required him to be at all times at the brake, or at any particular place upon the train, or that to be upon the engine, in accordance with a customary practice, was a violation thereof; and that the evidence was sufficient to authorize the submission to the jury of the question whether deceased was rightfully upon the engine when the accident happened, and to sustain a finding in favor of the plaintiff. And in a Wisconsin case,<sup>4</sup> RYAN, J., said: "If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom could excuse the danger. A positive acquiescence, *scienter*, of one so employed might indeed take away his right of action for injury received by such a structure. But there is public as well as private interest. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the State, concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb would seem to satisfy a duty which may be regarded as an implied condition of their charters. We use the word 'unnecessarily' advisedly, distinguishing necessity from convenience. A convenience may be so great as to be regarded as a practical necessity; but a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle-chutes to the track as to jeopardize life and limb of persons operating trains."

<sup>1</sup> Pennsylvania Co. v. Hankey, 10 Cent. L. J. 337.

<sup>2</sup> Kroy v. Chicago, etc., R. Co., 32 Iowa, 427.

<sup>3</sup> Sprong v. Railroad Co., 60 Barb. 30.

<sup>4</sup> Dorsey v. Phillips, etc., Construction Co., 42 Wis. 533.

## Negligence.

§ 172. Customs to excuse Negligence rejected. — Usages set up for the purpose of excusing neglect have, however, been rejected in several cases. It has been held that a usage will not excuse a carrier for the neglect of any duty which he owes to a passenger. Thus, in an action against a ferryman for the loss of a horse and wagon while crossing a river on his ferry, it appeared that there was a chain at the forward end of the boat, which, if it had been fastened up, would have prevented the accident. The defendant offered, but was not permitted, to show that it was the custom at the ferries on that river to have a chain at the end of the boat, but only to put it up at the request of passengers. On appeal, the court held that the evidence of custom was rightly rejected. "The usage sought to be proved would not be a good usage if it prevailed; it would make the safety of the passenger depend upon his own conduct, and not on the care and vigilance of the ferryman. If the putting up of the chain was a reasonable and proper precaution, it ought to be put up by the ferryman without a request: if was not so, a request would not make it so."<sup>1</sup> And where, in an action against a stage-coach proprietor for an injury to a passenger, the negligence alleged being the overloading of the coach, the defendant offered to prove that it was the custom on that route to carry as great a number of passengers as were on that particular coach at the time of the accident, the evidence was ruled to be inadmissible.<sup>2</sup> Similarly, where a number of boxes of books and other property were stowed by a warehouseman on a wharf in close proximity to the water, and by reason of a sudden storm that portion of the wharf was submerged and the goods were injured, it was held that evidence that it was defendant's custom to store goods on the wharf was properly excluded, as such a usage could not free him from responsibility.<sup>3</sup> In an action against a town for an injury caused by a defective bridge, the question as to how the particular bridge compared, as to safety and repair, with other bridges of like character on roads of like amount of travel, is irrelevant;<sup>4</sup> and in an action against a railroad company for damages caused by fire from one of its locomotives, the issue being whether the defendant had used due caution and diligence in preventing the spread of the fire, evidence that it was not the usual practice among railroads in that section of the country to employ watchmen is inadmissible.<sup>5</sup> In an Alabama case, where a quantity of cotton was ignited by a torch-light on the boat on which it was being carried, in a suit for its loss the plaintiff asked an instruction that if the torch-light had communicated the fire to the cotton, the latter being so near as to be exposed to the danger, this was negligence, and rendered the defendant liable, "although the jury should believe that it was usual for steamboats to carry torch-lights," which the court refused. This the Supreme Court held to be error, saying: "The result would not be changed by the existence of a custom to carry torches at night. A custom which would authorize a carrier to carry a torch in such a manner as to endanger the cargo would be violative of law and good faith, and could not receive judicial sanction. If a boat cannot be run at night without the aid of torches, carried in such a manner as to endanger the cotton or freight, to stop is the plain duty of the carrier. Custom cannot

<sup>1</sup> *Miller v. Pendleton*, 8 Gray, 547.

<sup>2</sup> *Maury v. Talmadge*, 2 McLean, 157.

<sup>3</sup> *Merchants', etc., Transp. Co. v. Störy*, 50 Md. 5.

<sup>4</sup> *Bliss v. Inhabitants of Wilbraham*, 3 Allen, 564.

<sup>5</sup> *Grand Trunk R. Co. v. Richardson*, 91 U. S. 434.

Custom and Usage.

relieve from the obligation to bestow, even in guarding against the excepted danger from fire, reasonable care and diligence in taking care of the freight."<sup>1</sup> So, where the question was whether a railroad company had been negligent in blowing the whistles of locomotives at crossings so as to frighten horses, it was held "competent to show a custom on other railroads to blow whistles in a similar way." "If all the railroads in the country," it was said, "adopt any rule or custom which is unreasonable or dangerous, and productive of injury, the generality of the custom cannot, in a given case, in any degree excuse or justify the act."<sup>2</sup> And, therefore, where the negligence imputed to a railroad company was the failure to maintain a flagman at a crossing, the custom of other railroads in maintaining flagmen at crossings was excluded.<sup>3</sup> In an action against a city for an injury to a pedestrian, caused by an opening in the sidewalk, it was ruled that the existence of similar apertures in various other parts of the city for a long period did not show that the alleged defect was not one for which the city was liable if any damage was occasioned thereby.<sup>4</sup> Therefore, in a subsequent case, where the injury was from a defective crossing, and evidence of the manner in which other cities and towns of similar size, character, and circumstances constructed their sidewalks and crossings was offered and rejected, the Supreme Court said: "This evidence was properly refused, on the ground that the condition of like structures in other towns and cities is no criterion for the defendant. If other towns and cities choose to suffer such public necessities to be in an unsafe and dangerous condition, their negligence is no excuse or justification for the defendant. The city authorities of Champaign are to do their whole duty in the premises as prescribed by law, with no reference as to what may be done or left undone by the authorities of other cities."<sup>5</sup> And in another case, an action against a town for an injury received by reason of an uncovered drain, evidence that it was usual for towns in that part of the country to leave drains uncovered was excluded.<sup>6</sup> And a usage cannot excuse an agent for any wilful neglect in securing the property of his principal.<sup>7</sup>

In a recent case, where the defendants were street-sprinklers, whose duty it was to keep the hydrants which they used in proper order, and the plaintiff was injured in the winter-time by slipping on a piece of ice formed by water which they had allowed to escape from a hydrant, it was held not competent to show a custom among street-sprinklers that at the close of the season for sprinkling the streets when the water was supposed to be shut off, the boxes and pipes were not visited until the opening of the season in the spring. It was the duty of the defendants to visit their attachments to the hydrants constantly, if constant visits were necessary to prevent overflows; or, if they chose not to make necessary visits, they were answerable for the consequences. The rights of a party injured through this neglect were not dependent upon such habits as they and others in the same business might choose to adopt.<sup>8</sup>

<sup>1</sup> *Hibler v. McCartney*, 31 Ala. 501.

<sup>2</sup> *Hill v. Portland, etc., R. Co.*, 55 Me. 438.

And see *Gahagan v. Boston, etc., R. Co.*, 1 Allen, 187.

<sup>3</sup> *Bailey v. New Haven, etc., R. Co.*, 107 Mass. 496.

<sup>4</sup> *Bacon v. City of Boston*, 3 Cush. 174.

<sup>5</sup> *City of Champaign v. Patterson*, 50 Ill. 61.

<sup>6</sup> *Hinckley v. Barnstable*, 109 Mass. 126.

<sup>7</sup> *Goodenow v. Tyler*, 7 Mass. 36; *ante*, p. 180. And see *Stephens, etc., Transp. Co. v. Tuckerman*, 33 N. J. L. 543.

<sup>8</sup> *Crocker v. Schureman*, 7 Mo. App. 358.

## Nuisance — Fraud.

§ 173. To show a Nuisance. — *Bradley v. The People*<sup>1</sup> belongs under the head of usages affecting the law of negligence, rejected by the courts, though in that case the evidence of custom was to show negligence, not to excuse it. The defendants were indicted, and convicted of maintaining a nuisance. The nuisance was a powder-house, which was built of pine boards, and situated only eleven rods from a highway along which people were constantly passing. It contained several tons of powder; and one of the sides below the floor was left open. It was proved that people were in the habit of taking shelter from the rain under it, and on one occasion a man was seen smoking there. On the trial, an artilleryman who had been in charge of a government ordnance bureau was asked to describe the ordinary mode of constructing powder-magazines, and testified that they were constructed of earth, frames of heavy timber being first set in the ground; that no nails or iron was used in any part; that they were protected by outside and inside doors, and that no person was permitted to enter them except in stocking-feet. For the admission of this evidence the conviction was reversed in the Supreme Court. The court thought that if the object of the testimony was to show that it was the duty of the defendants to build their powder-house in the same way, it was incompetent; "for, to hold that all dealers in gunpowder who have occasion to keep it in quantities are bound to construct their storehouses for that purpose in the same way that is deemed necessary for forts and arsenals would virtually interdict the traffic in the article by private persons, who could not afford the expense necessary to comply with any such requirement."

§ 174. Frauds. — In transfers of property by husband to wife, or by wife to husband, or where one of them is tacitly permitted to deal with the property of the other, the question as between them, or between either and those claiming as assignees or successors of the other, is one of intent. There, usage as well as their express agreements may determine whether the transaction is a loan or a gift, or only a change of possession under an agency.<sup>2</sup> In an action for fraud in the sale of wool, the fraud consisting in the delivery of several ounces of unwashed tags and dirty wool concealed in each fleece, the custom of putting up wool in the section of the country where it is bought is relevant.<sup>3</sup>

Fraud cannot be proved by independent evidence of a custom; therefore, in *Gerhard v. Neese*,<sup>4</sup> where a common carrier brought an action for freight earned in transporting cotton from a point in the State to Brownsville during the civil war, and the defendant, in order to raise a presumption that the plaintiff was engaged in an illegal exportation of the cotton, was allowed by the court to prove a custom, then prevalent, of running cotton from Brownsville across the Rio Grande into Mexico, this was held to be error.

<sup>1</sup> 56 Barb. 72.

<sup>2</sup> Abb. on Trial Ev. 173; *Chambovet v. Cagney*, 35 N. Y. S. C. (J. & S.) 496; *Jacobs v. Hessler*, 113 Mass. 161; *Kleine's Appeal*, 39 Pa. St. 463; *Mason v. Bowles*, 117 Mass. 86; *Campbell v. Campbell*, 21 Mich. 438; *Moyer's Appeal*, 77 Pa. St. 436; *Alston v. Rowles*, 13 Fla. 123; *Huston v. Clark*, 50 N. H. 482; *Southwick v. Southwick*, 9 Abb. Pr. (N. S.) 109; 49 N. Y. 510; *Hall v. Young*, 37 N. H. 134; *Lyons v. Green Bay, etc., R. Co.*, 42 Wis. 548; *Patten*

*v. Patten*, 75 Ill. 446; *Ashworth v. Outram*, 37 L. T. (N. S.) 85; *Peters v. Fowler*, 41 Barb. 467; *Hart v. Young*, 1 Lans. 417; *Nash v. Mitchell*, 3 Abb. N. C. 171; *Wheldon v. Champlin*, 59 Barb. 61; *Smith v. Kennedy*, 13 Hun, 9; *Cuck v. Quackenbush*, 13 Hun, 107; *Hills v. Holtz*, 18 N. H. 603. And see *ante*, § 165.

<sup>3</sup> *Willard v. Merritt*, 45 Barb. 296.

<sup>4</sup> 36 Texas, 635.

Trespass.

§ 175. **Trespass.**—What is a reasonable and proper use of a public or private way depends much on public usage. The general use and acquiescence of the public is evidence of the right. The owner of land may make such reasonable use of the way adjoining his land as is usually made by others similarly situated. In a populous town, where land is valuable, it is the custom to erect buildings and fences on the line of the street, and to place doors and gates in them so as, when opened, to swing over the street. In like way, where the owner of a lot in such a situation has occasion to build, and for that purpose to dig cellars, it is usual to lay his building-materials and earth within the limits of the street. So, again, to improve the way, an adjoining owner, with an honest intent to improve the way and make it more convenient for public use, sometimes spreads earth and gravel on it. A proprietor allows ornamental work on his house to project over the street; he permits horses and carriages to stand in the street against or near his house. All these acts, it is true, are technically trespasses; but considering the usages and customs of the community, they are not so. They become, by virtue of these, appropriate and proper uses of the highway. Were it not so, as said by MARTIN, J., in a Massachusetts case,<sup>1</sup> "very few of us would escape."<sup>2</sup> But where a person had erected a bay window to his house, projecting over the land of an adjoining owner, the court said: "If there be a custom in Boston to erect bay windows, balconies, and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be the custom to erect them over the land of other people, such a custom is illegal, and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston."<sup>3</sup> And the custom of the inhabitants of a part of a city to allow children to play in the streets does not show that such use of the streets was lawful.<sup>4</sup>

But a custom to take anything from another's land could not be supported at common law, the rule being that a *profit à prendre* could not be claimed *in alieno solo*.<sup>5</sup> A custom to occupy or take from the land of another is bad.<sup>6</sup> And, except as seen in the last paragraph, a usage cannot excuse a trespass.<sup>7</sup> A gen-

<sup>1</sup> O'Linda v. Lothrop, 21 Pick. 292.

<sup>2</sup> Underwood v. Carney, 1 Cush. 285; Gerard v. Cook, 2 Bos. & Pul. N. R. 109; Philadelphia v. Presbyterian Board, 29 Leg. Int. 53; The Commonwealth v. Blaisdell, 107 Mass. 234; Hall v. Nottingham, 24 Week. Rep. 58.

<sup>3</sup> Godman v. Evans, 5 Allen, 378.

<sup>4</sup> Schierhold v. North Beach, etc., R. Co., 40 Cal. 447. And see Evans v. Bidwell, 20 Conn. 209.

<sup>5</sup> Bastard v. Smith, 2 Moo. & R. 129; Race v. Ward, 4 El. & Bl. 702; Constable v. Nicholson, 14 C. B. (N. S.) 230; Churton v. Frewen, L. R. 2 Eq. 634; Hamner v. Chance, 11 Jur. (N. S.) 397; Shuttleworth v. Le Fleming, 19 C. B. (N. S.) 687; Dyce v. Hay, 1 Macq. H. L. Cas. 305; Bland v. Lipscombe, 4 El. & Bl. 712; 1 Jur. (N. S.) 707; 3 Com. Law Rep. 261; Steel v. Houghton, 1 H. Black. 51; Wor-

ledge v. Manning, 1 H. Black. 53; Lloyd v. Jones, 12 Jur. 657; 17 L. J. (C. P.) 206; 6 C. B. 81; Attorney-General v. Mathias, 27 L. J. (Ch.) 761; Wilkinson v. Proud, 11 Mee. & W. 33; Horton v. Beckman, 6 Term Rep. 760; Grimstead v. Marlowe, 4 Term Rep. 717; Cooper v. Barber, 3 Taun. 99; Gateway's Case, 6 Coke, 60 b; Canbain v. Fish, 1 Price P. C. 148. A custom that all the inhabitants of a particular town, for the time being, have a right to depasture the unenclosed lands of individual proprietors within the town, is void. Smith v. Floyd, 18 Barb. 523.

<sup>6</sup> Waters v. Lilley, 4 Pick. 145; 16 Am. Dec. 333; Cobb v. Davenport, 3 Vroom, 369; Littlefield v. Maxwell, 31 Me. 135; Kenyon v. Nichols, 1 R. I. 106.

<sup>7</sup> Rivers v. Burbank, 13 Nev. 398; Knowles v. Dow, 22 N. H. 387; Perley v. Langley, 7 N. H. 233; Nudd v. Hobbs, 17 N. H. 525.



## Negligence.

eral usage of depositing lumber on the bank of a river, without more, cannot raise a presumption of a grant.<sup>1</sup> In an action of trespass for killing a mare with dogs, that it is the custom of the neighborhood to set dogs on horses which broke into fences or enclosures is irrelevant;<sup>2</sup> but where the plaintiff's colt had been killed by, as was alleged, the negligence of the defendant in removing trees on his land, it was held that, it being shown to be the custom of the neighborhood to permit horses and cattle to run at large, the defendant could not resist the action on the ground that the colt was trespassing on his land when it was killed.<sup>3</sup>

In North Carolina it is held that a license to enter upon land and take fish cannot be implied by proving a custom in the country at large for every person to enter upon such lands and take fish. "By the common law," say the court, "an imaginary line is thrown around the land of every one, which may not be entered without subjecting the wrong-doer to an action. No custom or usage can change this law. If the owner of land unreasonably refuses to allow his neighbors to fish in his mill-pond, or to gather strawberries in his old field, the only correction is to arraign him at the bar of public opinion for the violation of the rules of good neighborhood."<sup>4</sup> On the other hand, in a recent Michigan case,<sup>5</sup> an action of trespass was brought against the defendant for fishing in the plaintiff's lake. The plaintiff had a verdict, which was reversed on appeal. The court admitted the right of the landholder over the lake in question, but said: "It has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the State, and, in the absence of any notification to the contrary, we think that any one may understand that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so." This quotation includes everything that was said by the court, and the conclusion is therefore unsatisfactory, for wanting any reference to the older cases.<sup>6</sup>

Where there is a general usage in a neighborhood to let cattle run at large upon the highway and unenclosed lands adjoining, one adopting the usage is taken to have thereby licensed the cattle of others to run at large on his lands so situated.<sup>7</sup>

§ 176. *Use of Watercourses.* — As to what is a reasonable use of water in a stream is always a question of fact, and is to be determined by the capacity of the stream, the nature and character of the works sought to be propelled thereby, the machinery used, or the reasonable necessities of the mill-owner in view of all the facts, and finally by the custom of the country.<sup>8</sup> "Usage is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience of such use."<sup>9</sup>

<sup>1</sup> *Bethum v. Turner*, 1 Me. 111. And see *Heath v. Ricker*, 2 Me. 72; *A. v. Morse*, 51 Me. 497.

<sup>2</sup> *Evans v. Healer*, 1 Bibb, 561.

<sup>3</sup> *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 133.

<sup>4</sup> *Wander v. Blake*, 4 Jones L. 332.

<sup>5</sup> *Marsh v. Colby*, 39 Mich. 626.

<sup>6</sup> And see *Lloyd v. Jones*, 6 C. B. 81.

<sup>7</sup> *Wheeler v. Rowell*, 7 N. H. 515.

<sup>8</sup> *Wood on Nuis.*, § 416.

<sup>9</sup> *Gould v. Boston Duck Co.*, 13 Gray, 452;



Crimes.

§ 177. **Offices and Officers.**—Usage may prescribe an officer's duty,<sup>1</sup> his powers,<sup>2</sup> and his compensation.<sup>3</sup> In regard to the filling of offices, the usage of the government<sup>4</sup> and the custom of a church society<sup>5</sup> have in different cases been recognized. So, the long-continued practice of the executive department of the government to sign bills passed by the legislature, in a certain mode, is noticed by the courts.<sup>6</sup> In a Kentucky case, where an acknowledgment was taken by a deputy-clerk who at the time was a minor, the court said: "There is no statute in this State prescribing the qualifications of a deputy-clerk. It has been the immemorial custom of clerks to appoint minor deputies, and, as far as we are advised, the legality of such appointments has never before been called in question, and we must regard such long-continued acquiescence on the part of the legislature, the bench, and the bar as the very highest possible evidence of its legality."<sup>7</sup> The following acts have been supported by the courts on proof of usage, viz.: A sale by the sheriff, by virtue of writs of *venditioni exponas*, after the return-day;<sup>8</sup> the approval of an administration bond;<sup>9</sup> the receipt by a deputy-sheriff of the amount due on an execution, and its discharge after the return-day;<sup>10</sup> the employment by a notary-public of clerks to perform a part of his duties.<sup>11</sup> And in an action by a sheriff on the bond of one of his deputies, the question being whether a certain return was a false one, evidence that it was in accordance with custom was held competent.<sup>12</sup>

Where a justice of the peace was indicted for malpractice in office, in not returning a warrant and recognizance issued by him to the Supreme Court, but wilfully and corruptly suppressing it, evidence of a practice of other justices going to excuse the defendant's acts was rejected.<sup>13</sup>

§ 178. **Crimes.**—In *The State v. Ramsay*,<sup>14</sup> a prosecution against one for disturbing worship, in interrupting the services by rising to his feet in the congregation and persisting in speaking, until removed from the church, it was held proper for the State to ask a witness "If it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make known his grievances." Where one is indicted for carrying a weapon concealed on his person, and the issue is whether the weapon (a pistol) was concealed, that it was his custom to carry a pistol about his person openly exposed to view is irrelevant.<sup>15</sup>

Thurber v. Martin, 2 Gray, 394; Snow v. Parsons, 28 Vt. 459; Dumont v. Kellogg, 29 Mich. 420; Timm v. Bear, 29 Wis. 254; Thomas v. Brackney, 17 Barb. 654; Hill v. Ward, 7 Ill. 285; Pollitt v. Long, 58 Barb. 20; Bassett v. Salisbury Man. Co., 43 N. H. 567; Hays v. Waldron, 44 N. H. 584; Norway Plains Co. v. Bradley, 52 N. H. 110.

<sup>1</sup> Fennings v. Lord Grenville, 1 Taun. 241; Woods v. Galbraith, 2 Yeates, 306; Eddy v. Faulkner, 3 Yeates, 580.

<sup>2</sup> Taylor v. Sotolingo, 6 La. An. 154.

<sup>3</sup> United States v. McDaniel, 7 Pet. 1; United States v. Fillebrown, 7 Pet. 28.

<sup>4</sup> The State v. Lowell, 15 Ark. 664.

<sup>5</sup> Miller v. Eshbach, 43 Md. 1.

<sup>6</sup> Solomon v. Commissioners, 41 Ga. 157.

<sup>7</sup> Talbott v. Hooser, 12 Bush, 410.

<sup>8</sup> Blythe v. Richards, 10 Serg. & R. 261; 13 Am. Dec. 672.

<sup>9</sup> Mayhew v. Soper, 10 Gill & J. 366.

<sup>10</sup> Wyer v. Andrews, 13 Me. 168.

<sup>11</sup> Monroe v. Woodruff, 17 Md. 159.

<sup>12</sup> Naylor v. Semmes, 4 Gill & J. 273.

<sup>13</sup> Lynes v. The State, 46 Ga. 203.

<sup>14</sup> 78 N. C. 448.

<sup>15</sup> Washington v. The State, 36 Ga. 242.

And see further, *ante*, § 30.

## CHAPTER IV.

### ON THEIR ADMISSIBILITY TO EXPLAIN WRITTEN AND OTHER EXPRESS CONTRACTS.

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#### ILLUSTRATIVE CASES: —

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## 24. TO EXPLAIN WORDS AND PHRASES THEREIN.

## SMITH v. WILSON.\*

*In the English Court of King's Bench, Trinity Term. 1832.*

CHARLES, LORD TENTERDEN, *Chief Justice.*

Sir JOSEPH LITTLEDALE, Kt.,

" JAMES PARKE, Kt.,

" WILLIAM ELIAS TAUNTON, Kt.,

" JOHN PATTESON, Kt.,

*Judges.*

In a lease of a rabbit-warren, the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits, the lessor paying for them £60 per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term: *held*, that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted *twelve hundred*.

This was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, *inter alia*, a warren: "That at the expiration of the term, they (the plaintiffs) would leave on the warren 10,000 rabbits, or conies, the defendant paying £60 per thousand for the same, and for any more than that number, at that rate, the number to be estimated by two different persons, one to be chosen by each party." Averment that at the expiration of the term the plaintiffs left more than 10,000 — to wit, 19,200 — rabbits upon the warren, but that the defendant would not pay for the same. Plea: *Non est factum*.

At the trial before GARROW, B., at the Summer Assizes for Suffolk. 1831, it appeared that at the expiration of the term the number of rabbits on the warren was estimated by two different persons chosen by the parties to be 1,600 dozen. It was contended for the defendant that, according to the custom of the country, the 1,600 dozen should be computed at 100 dozen to the thousand, and, therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand, it was insisted for the plaintiffs that the words "per thousand" must be

\* Reported 3 Barn. & Adol. 728.

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Smith v. Wilson.

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understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1,600 dozen. The defendant paid into court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to show that the term "thousand," as applied to rabbits, meant in that part of the country 100 dozen. This evidence was objected to, but received by the learned judge, and he directed the jury to find for the defendant if they thought it was proved that the word "thousand," as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule *nisi* was obtained for a new trial, on the ground that the evidence had been improperly received.

*Biggs Andrews* now showed cause. — The evidence was admissible. The word "thousand" does not, either in law or practice, denote a precise number of units. A thousand may more generally than otherwise denote ten hundred, of five score to the hundred; but there are many instances where, as applied to a particular article, it denotes six score to the hundred — as, nails, herrings,<sup>1</sup> deal boards. As, therefore, the word has more than one meaning, its import in any particular instrument depends on the subject-matter to which it is applied. But, even if in its ordinary and popular sense it means ten hundred, yet if it has acquired (in respect to the subject-matter to which it is applied) a peculiar sense distinct from the popular one, then in all contracts relating to that particular subject-matter the acquired meaning must be put upon it.<sup>2</sup> The object of the evidence is not to add to, vary, or contradict the deed, but to explain the meaning which a party to a contract must have put upon a particular word used in it, and that must be ascertained by evidence *dehors* the deed. Wherever parol evidence has been rejected in cases of this kind, it was because the effect of it was to show that the parties meant something different from what they have said; but here that was not the effect of the evidence, and it was admissible according to the rule laid down in *Starkie on Evidence*.<sup>3</sup> In *Uhde v. Walters*,<sup>4</sup> where an insurance was to any port in the Baltic, evidence was admitted to show that the Gulf of Finland was considered, in mercantile contracts, within the Baltic, although the two seas are treated as distinct by geographers. So, in *Baker v. Payne*,<sup>5</sup> where the captain of an India ship sold all his china-ware and merchandise which he brought home in his last voyage, and covenanted to deduct all due *allowances*, etc., he was permitted to adduce proof of a custom to show that such allowances were to be limited by the price which he was to

<sup>1</sup> By the statute 31 Edw. III., st. 2, c. 2.

<sup>2</sup> *Robertson v. French*, 4 East, 135, *per* Lord Ellenborough.

<sup>3</sup> Page 1033.

<sup>4</sup> 3 Camp. 16.

<sup>5</sup> 1 Ves. 459.

## Illustrative Cases.

receive. In *Wigglesworth v. Dallison*,<sup>1</sup> it was held that parol evidence was admissible to show that, according to the custom of the country, where a lease for a term of years expired on the 1st of May, the tenant was entitled to take the waygoing crop after the expiration of the term, though this was not mentioned in the deed executed between the parties.<sup>2</sup> *Doe dem. Spicer v. Lea*<sup>3</sup> may be relied upon on the other side. There a lease was made after the alteration of the style by act of Parliament, and extrinsic evidence to show that the parties meant Michaelmas according to the old style was held to be inadmissible; but that proceeded on the ground that the parties must be taken to have used the term in conformity with the statute, which expressly regulated the reckoning of time.

*Kelly and Austin, contra.* — The general rule is that parol evidence is not admissible to explain a written instrument; and in *Anderson v. Pitcher*,<sup>4</sup> Lord ELDON regretted that the practice had obtained of receiving such evidence even as to policies of insurance. In the herring trade a precise meaning is given to the word "thousand," as applied to that particular subject-matter, by act of Parliament. Here the words of the covenant must be construed in their ordinary sense. The ambiguity, if any, is at all events latent. It is produced by something extrinsic or collateral to the instrument. The covenant, however, will have an operation if the parol evidence is not received, and then, according to *Doe dem. Chichester v. Oxenden*,<sup>5</sup> such evidence is not admissible. To say in the present case that a thousand means twelve hundred is not to explain, but to contradict the deed. In *Hockin v. Cooke*,<sup>6</sup> proof that the defendant agreed to sell so many bushels of corn according to a particular measure was held not to support an allegation in a declaration that he undertook to sell so many bushels, because "bushels," without any other explanation, meant a bushel by statute measure. So, a *reddendum*, in an old renewed lease, of so many quarters of corn was held to mean Winchester, and not the customary bushel.<sup>7</sup> And in *Wing v. Erle*,<sup>8</sup> GAUDY, J., said that "if one sells land, and is obliged that it contains twenty acres, this shall be according to the law, and not according to the custom of the country."

Lord TENTERDEN, C. J. — I am of opinion that the evidence was properly received. Where there is used in any written instrument a word denoting quantity, to which an act of Parliament has given a definite

<sup>1</sup> 1 Doug. 201, *ante*, p. 169.

<sup>2</sup> See other instances cited in *Cross v. Eglin*, 2 Barn. & Adol. 106.

<sup>3</sup> 11 East, 312.

<sup>4</sup> 2 Bos. & Pul. 168.

<sup>5</sup> 3 Taun. 147.

<sup>6</sup> 4 Term Rep. 314.

<sup>7</sup> *The Master, etc.*, of *St. Cross v. Lord Howard de Walden*, 6 Term Rep. 338.

<sup>8</sup> Cro. Eliz. 267.

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Smith v. Wilson.

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meaning, I agree it must be considered to have been used in that sense. But there is no act of Parliament which says one thousand rabbits shall denote ten hundred, each hundred consisting of five score; and that being so, we must suppose the term "thousand" to have been used by the parties in the sense in which it is usually understood in the place where the contract was made, when applied to the subject of rabbits, and parol evidence was admissible to show what that sense was.

LITLEDALE, J. — I am of the same opinion. Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given to them by statute or custom. But here the ordinary meaning of the word "thousand," as applied to rabbits in the place where the contract was made, was one hundred dozen. The word "hundred" does not necessarily denote that number of units, for one hundred and twelve pounds is called a "hundred-weight;" so, where that term is used with reference to ling or cod, it denotes *six* score; and there being, therefore, no precise meaning affixed by the legislature to the word "thousand," as applied to rabbits, I think that parol evidence was admissible to show that in the country where the contract was made the word "thousand" meant one hundred dozen.

PARKE, J. — The only question is whether the evidence has been properly received. Assuming that it has, the jury have found that, according to the custom of the country, there was an understanding between the parties to this contract that the defendant should pay for the rabbits, computing them at the rate of one hundred dozen to the thousand. The rule deducible from the authorities on this subject is correctly laid down in 3 *Starkie on Evidence*:<sup>1</sup> "Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and if the word "thou-

<sup>1</sup> Page 1033.

Illustrative Cases.

sand," as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to show it. In an action upon a contract for the sale of one thousand deals, it would, I think, be competent to show that the word "thousand" meant more than it would in its ordinary sense. I agree that where a word is defined by act of Parliament to mean a precise quantity, the parties using that word in a contract must be presumed to use it in the sense given to it by the legislature, unless it appear from other parts of the contract that they used it differently. But that is not the present case. No specific meaning has been given by the legislature to the word "thousand" as applied to rabbits, and therefore it must be understood according to the custom of the country, and evidence was admissible to show what that was.

TAUNTON, J. — Words denoting weight, or measure, or number, must undoubtedly be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute or given by custom. Mercantile instruments have long been expounded according to the usage and custom of merchants, ascertained by parol evidence, and I think, on the same principle, the term "thousand," which in this lease is applied to the subject of rabbits, may be explained by the custom of the country to mean twelve hundred, and that parol evidence was admissible for this purpose.

*Rule discharged.*

25. TO ADD TERMS AND INCIDENTS THERETO.

COOPER v. KANE.\*

*In the Supreme Court of New York, May, 1833.*

Hon. SAMUEL NELSON, *Chief Justice.*

" GREENE C. BRONSON, } *Judges.*  
" ESEK COWEN, }

A contract for the excavation of lots in a city, so as to make them conform to a certain plan, was silent as to whom should belong the sand or other material taken therefrom. A custom existed, long established and notorious, that it went to the excavator, and not to the owner of the lots. *Held*, that evidence of the custom was admissible to explain the contract of the parties.

THIS was an action of replevin, tried at the Albany Circuit, in October, 1835, before the Hon. HIRAM DENIO, then one of the circuit judges.

\* Reported 19 Wend. 334.



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Cooper v. Kane.

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The action was in *detinet*, for detaining a quantity of sand taken from a lot in the city of Albany, belonging to the plaintiff, which the defendant had excavated under a contract with the plaintiff, so as to make the lot conform to a profile or plan of the streets established by the corporation. The contract was in writing. The defendant was to excavate the lot and make the necessary embankments within a limited time, for which he was to be paid by the plaintiff \$180 when the work was done. The defendant completed the job, and was paid the stipulated price. Whilst engaged in the work, the defendant placed a large quantity of sand, which was taken off of the lot in order to make it conform to the required plan, on an adjoining lot, not belonging to the plaintiff, and when requested by the plaintiff to permit her to take it away, he refused such permission. For this detention the action was brought. There was no stipulation in the contract as to whom the sand taken from the lot in making the excavation should belong after it was taken off the lot. The defendant then offered to prove a custom of the city of Albany, which had existed for a great number of years, and was well known and understood, that in the excavation of lots the material excavated belonged to the excavator, and not to the owner of the lot, unless there was an express reservation in the contract to the contrary. The judge rejected the testimony, and instructed the jury that on the evidence adduced the plaintiff was entitled to their verdict, who accordingly found a verdict for the plaintiff, with six cents damages and six cents costs, and assessed the value of the property at \$157. The defendant moves for a new trial. The cause was submitted on written arguments.

*C. M. Jenkins*, for the defendant; *J. Holmes*, for the plaintiff.

NELSON, C. J. — I am inclined to the opinion that the evidence of the custom in respect to contracts like the one out of which this action has arisen, by way of explaining it, and which was offered by the defendant for that purpose, was admissible. It did not go to vary any express or necessarily implied stipulations between the parties therein contained, but rather to establish what amounted to a complete performance agreeably to the presumed understanding of the parties.

Mr. STARKIE says:<sup>1</sup> "Where parties have not entered into any express and specific contract, a presumption nevertheless arises that they meant to contract and to deal according to the general usage, practice, and understanding, if any such exist, in relation to the subject-matter." The same rule of evidence is also recognized by PHILLIPS;<sup>2</sup> and Lord KENYON remarked, in *Whitnell v. Gartham*,<sup>3</sup> that evidence of

<sup>1</sup> 2 Stark. on Ev., §§ 258, 259.

<sup>2</sup> 1 Ph. on Ev. 420, 421.

<sup>3</sup> 6 Term Rep. 398.

Illustrative Cases.

usage was admissible to expound a private deed as well as the king's charter. The right of carriers, dyers, wharfingers, etc., to a lien on the goods intrusted to them, for their compensation, is frequently established by usage, independently of the contract. In *Rushforth v. Hadfield*,<sup>1</sup> Lord ELLENBOROUGH permitted the defendants (common carriers) to go into proof of common usage to detain the goods for a general balance, on the ground of an implied agreement arising out of it between the parties. He observed that if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their contract. LAWRENCE, J., admitted that the lien must be by contract between the parties, but observed that usage of trade was evidence of the contract, and if so long established as to afford a presumption that it was commonly known, it was fair to conclude the particular parties contracted with reference to it. In *Kirkman v. Shawcross*,<sup>2</sup> the dyers, dressers, whisters, printers, etc., of a neighborhood held a public meeting, and entered into an agreement that they would receive no more goods in the way of their trade except on the condition that they should have a lien on them for a general balance, which was extensively published. The court held that any person who delivered goods to them after notice must be deemed to have assented to the terms prescribed; and, as we have seen, notice might be inferred from the general notoriety of the terms thus published.

Now, in this case, there is simply an agreement to excavate the earth in a certain street and to make the necessary embankment according to a map of the corporation, for a given compensation. Nothing is said about the surplus earth: where it is to be laid, or what is to be done with it. Would it be a workman-like execution of the contract to pile it upon the adjacent bank? Or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me the solution of these questions may very well be referred to common usage in such cases, if any exist; and that if it should be proved, as said by LAWRENCE, J., "it is fair to conclude the particular parties contracted with reference to it." This usage may often have a very important influence upon the minds of the parties, as exemplified in this case, for the value of the materials which the plaintiff has recovered nearly equals the price of the job. If in fact the usage exists, and the contract was made in reference to it, serious injustice must be the result of upholding the verdict.

*New trial granted.*

<sup>1</sup> 6 East, 519.

<sup>2</sup> 6 Term Rep. 14.

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Humfrey v. Dale.

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## 26. SAME PRINCIPLE.

## HUMFREY v. DALE.\*

*In the Court of Queen's Bench, Hilary Term, 1857.*Rt. Hon. JOHN, Lord CAMPBELL, *Chief Justice.*

Sir JOHN TAYLOR COLERIDGE, Kt.,

" WILLIAM WIGHTMAN, Kt.,

" WILLIAM ERLE, Kt.,

" CHARLES CROMPTON, Kt.,

} *Judges.*

Defendants, brokers, being employed by S. to purchase oil, signed a note as follows: "Sold this day for Messrs. T.," plaintiff's brokers, "to our principals, ten tons of linseed oil," etc., "quarter per cent brokerage to" defendants. This note defendants delivered to Messrs. T. Defendants did not disclose the name of their principal, S., who became insolvent and did not accept the oil. Plaintiff then sued defendants for not accepting the oil, laying the sale as by himself to defendants. Defendants denied the contract. On the trial, plaintiff proved a custom in the trade that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as purchaser. *Held*, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms or adding a tacitly implied incident, and that the action lay.

THE declaration alleged that defendants bargained for and bought of the plaintiff, who, at the request of the defendants, sold to them a large quantity, to wit, ten tons, of linseed oil, at and for a certain price, to wit, £44 per ton, real tare and usual draft, to be free delivered during the last fourteen days of February, A. D. 1856, and to be paid for in ready money, allowing two and one-half per cent discount. And although the time for the delivery and acceptance of the said goods, pursuant to the said contract, had elapsed before the commencement of this suit, and the plaintiff was ready and willing, and offered to deliver the said goods to the defendants, pursuant to the said contract, and duly performed all conditions, etc., yet defendants did not, nor would accept or pay for the said goods, or any part thereof, pursuant to the said contract, but wholly neglected, etc.

Plea: That defendants did not bargain for and buy of plaintiff the said linseed oil, or make the said contract as alleged. Issue thereon.

On the trial before COLERIDGE, J., at the London Sittings in Easter Term, 1857, the following facts appeared, as stated in the judgment afterwards delivered:—

"The action was for the price of linseed oil alleged to be bargained and sold by the plaintiff to the defendants, and not accepted by them. The plea denied the bargain and sale.

\* Reported 7 El. & Bl. 206.

Illustrative Cases.

"The plaintiff had employed Thomas & Moore, brokers, to sell the oil for him. One Shenk was a buyer of oils, and had employed the defendants, who were brokers, to buy for him. The dealing in question was between the brokers; and after proof of the facts now stated, in order to prove the specific contract, the plaintiff put in the two following notes.

First: —

"75 OLD BROAD ST., LONDON, 14th August, 1855.

"Sold this day, for Messrs. Thomas & Moore, to our principals, 10 tons of linseed oil, of merchantable quality, at £44 per ton, real tare and usual draft, to be free delivered during the last 14 days February next, and paid for in ready money, allowing  $2\frac{1}{2}$  per cent discount.

"DALE, MORGAN & Co., Brokers.

"Quarter per cent brokerage to D., M. & Co."

"This note was signed as above, and sent by the defendants to Thomas & Moore.

Second: —

"LONDON, 14th August, 1855.

"Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, 10 tons of linseed oil, of merchantable quality, at £44 per ton, real tare and usual draft, to be free delivered during the last 14 days February next, and paid for in ready money, allowing  $2\frac{1}{2}$  per cent discount.

"THOMAS & MOORE, Brokers.

"Quarter per cent brokerage to D., M. & Co., a half to us."

"And the plaintiff further gave in evidence, without objection, that, according to the usage of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. In this case, the defendants had not disclosed their principal's name till an unreasonable time after the contract made, and when he had become insolvent."

On this evidence, the counsel for the defendants contended that the contract between the parties as laid in the declaration was not proved. A verdict was taken for the plaintiff, leave being reserved to move for a nonsuit.

In the same term, *Manisty* obtained a rule *nisi* for a nonsuit, on the following grounds: "First, that there was no evidence of the alleged contract of sale and purchase; second, that evidence of the alleged custom is not admissible;" or for a new trial on the ground of surprise, which was not insisted upon in argument.

In last term, *Pigott*,<sup>1</sup> Serjt., and *Kemplay*, showed cause. — There

<sup>1</sup> November 4, 1857, before Lord Campbell, C. J.; Coleridge, Wightman, and Erle, JJ.

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Hunfrey v. Dale.

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was evidence making the defendants liable as purchasers. The note signed by them indeed describes them as selling for Thomas & Moore, but it goes on to state the sale to be made "to our principals;" they are, therefore, on the face of the note, agents for undisclosed principals, who are the purchasers; and this renders them personally liable, though the principals might also be sued.<sup>1</sup> And that this is consistent with the form of the document appears from *Pennell v. Alexander*.<sup>2</sup> If this be not enough, on general principles, to fix the liability on the defendants, at any rate the usage does so. An objection is now made to the admissibility of the evidence of the usage. But it was given not to contradict the terms of the contract, but to interpret its meaning as between the parties. Mr. SMITH, in his note on *Thomson v. Davenport*,<sup>3</sup> says: "Some difficulty has been thought to surround the subject-matter of this note (namely, the creditor's right of election), arising out of that inflexible rule of the law of evidence commented on in *Wigglesworth v. Dallison*,<sup>4</sup> viz.: that the terms of a written contract cannot be qualified or contradicted by parol testimony. It has been said, if A. contract in writing without naming his principal, so that he appears upon the writing to be himself the principal, does not a creditor who seeks to show that while thus professedly contracting for himself he really contracted for a principal, endeavor to infringe this rule of evidence by adding to the written contract a new term at variance with the written terms? This question, it is, however, apprehended, must receive different answers upon different occasions — answers varying according to the object with which it is sought to introduce the parol testimony, which it is submitted never can be heard for the purpose of charging the agent, but may always be so for that of charging the principal." That view is fully confirmed by the judgment in *Higgins v. Senior*,<sup>5</sup> where SMITH's note is referred to. *Trueman v. Loder*<sup>6</sup> may be cited as opposed to this. The marginal note there states that "evidence was offered by defendant of a custom in the tallow trade that on such contracts as the above, 'a party might reject the undisclosed principal, and look to the broker for the completion of the contract.' Held, inadmissible, as varying a written contract." There the broker, acting for both parties, signed a bought-note beginning, "Bought for T.," the plaintiff, and a sold-note beginning, "Sold for H.," who represented the defendant, "to my principals," not named; and the attempt was to get rid of the

<sup>1</sup> *Thomson v. Davenport*, 9 Barn. & Cress. 78; 2 Smith's Ld. Cas. (4th ed.) 297, note; Story on Ag., § 267.

<sup>2</sup> 3 El. & Bl. 283.

<sup>3</sup> 2 Smith's Ld. Cas. (4th ed.) 303.

<sup>4</sup> 1 El. & Bl. 50; 1 Smith's Ld. Cas. (4th ed.) 460; 1 Doug. 201.

<sup>5</sup> 8 Moo. & W. 834.

<sup>6</sup> 11 Ad. & E. 539.

Illustrative Cases.

liability of the defendant as principal vendor. It was held that this could not be done; but it is here contended only that the evidence may be given to fix the principal, which accords with Mr. SMITH's rule, and does not contradict *Trueman v. Loder*. So, in *Magee v. Atkinson*,<sup>1</sup> where the broker was held liable, the evidence rejected was not of a custom charging the agent. In *Carr v. Jackson*,<sup>2</sup> it was held that evidence might be given to show that a party describing himself in a written contract as agent was in fact a principal. So, conversely, in *Schmaltz v. Avery*,<sup>3</sup> it was held that a party who had signed a written contract expressing that he acted for another, might still prove himself to be principal. The defendants, therefore, are here liable; and they are liable to the plaintiff, who has a right to sue on the contract made by his brokers, if the state of accounts between the other parties be not disturbed thereby.

*Manisty, contra.* — The note signed by the defendants is, at any rate, not in the ordinary form of a contract between themselves and the plaintiff; and it has been found necessary in the argument on the other side to treat it as a contract, not for sale for Thomas & Moore, but for purchasing on behalf of the unnamed principals. But, so understood, it is not a contract of purchase by, or sale to, the defendants. If the statement of the sale to the principals be untrue, the defendants are liable to an action. [COLERIDGE, J. — By "principals," must we not understand the principals in this particular contract?] If evidence may be given, as no doubt it may, as to who the principals are, that shows with whom the contract was made; if it could not, no contract at all would be proved. It is true that a party who takes the broker as the contractor, intending so to do, cannot afterwards look to the principal; but here the intention appears to have been to treat the contract as made, not between the plaintiff and the defendants, but as between Thomas & Moore and the principals of the defendants. In *Thomson v. Davenport*,<sup>4</sup> and other cases of that class, the question was as to resorting to the principal, which, it was held, the other party to the contract was entitled to do. Here the principals are the parties expressly made liable. The evidence of the custom, if admissible, would show a different contract, and would contradict the language of the written instrument. If the contract was with the defendants as purchasers, it was a contract not shown by any memorandum in writing; and, therefore, by the Statute of Frauds, it cannot be enforced.

*Cur. adv. vult.*

<sup>1</sup> 2 Mee. & W. 440.

<sup>2</sup> 7 Exch. 332.

<sup>3</sup> 16 Q. B. 655.

<sup>4</sup> 9 Barn. & Cress. 78.



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Lord CAMPBELL, C. J., now delivered the judgment of the court.

This was a rule to enter a nonsuit, and the facts upon which the question to be decided arises, appear to be the following. [His lordship then stated the facts as *ante*.]

It was then objected that upon this state of facts there was no evidence of any contract; but if of any, that it was of a contract between Thomas & Moore and the defendants, not of a contract between the plaintiff and them. And upon the argument the admissibility of the evidence of usage was debated; upon which, therefore, it will be necessary for us to express our opinion.

Upon consideration, we think that there is no foundation for either objection. Parol evidence was clearly admissible to show the circumstances under which the contract was made, and the relation of the plaintiff and defendants to it and to each other in respect of it. It was shown then, without the help of usage, that the plaintiff was the owner of the oil, and that Thomas & Moore were employed by him to sell it. By the note first stated, the defendants, signing as brokers, say that they have sold for Thomas & Moore to their own principals, whom they do not name, but for whom they, by necessary implication, say that they have bought. It cannot be doubted that although they say in the note they have sold for Thomas & Moore, the plaintiff might show that Thomas & Moore were only his agents, and that he was in fact the principal for whom the defendants sold, and with whom, if with any one, as the seller, the contract was made. But the defendants also state that they have bought; for they say they have sold to a person who is their principal, which must mean their principal as buyer in that transaction. Whether they had authority from him so as to bind him by their signature is not now the question as against him, but as against themselves; and they cannot deny that they have made such purchase as they themselves state. We have, then, as the case now stands, clear evidence of a contract of bargain and sale between the plaintiff as the seller and the undisclosed principal of the defendants.

The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now, neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract; but, subject to this condition, both may be received for certain purposes. To use the language of Mr. PHILLIPS,<sup>1</sup> "Evidence of usage has been admitted in the foregoing instance of contracts relating to transactions of commerce, trade, farming, or other

<sup>1</sup> 2 Ph. & Arn. on Ev. (10th ed.) 415.



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business, for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them, and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the presumed intention of the parties." Now, here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely: that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this; the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal. But the plaintiff, by the evidence, seeks to show that according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more, namely: that if the buying broker did not disclose the name of his principal, it might become a contract with him if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it as affecting the validity of the contract. for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker unless he disclosed the name of his principal; if he did that, it remained a sale to the principal — assuming, of course, the broker's authority to bind him. The case would then be analogous to that of the delivery of goods on a contract of "sale or return," where the goods pass only conditionally — that is, unless the buyer, within the limited or a reasonable time, if none be limited, exercises the option of returning them; if he does, the contract falls to the ground and is defeated, as if it had never been; if he does not, it takes effect from the time when it was made.

Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view it will be admissible, unless it labors under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not.

In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts.

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Humphrey v. Dale.

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To take a familiar instance by way of illustration: On the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace, which vary, according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. Thus, to warrant bacon to be "prime singed," adding, "that is to say, slightly tainted,"<sup>1</sup> or to insure all the boats of a ship, and add, "that is to say, all not slung in the quarter,"<sup>2</sup> and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and, therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves, it will be found that the same reasoning applies where the evidence is used to explain a latent ambiguity of language.

But here, if all that the plaintiff contends for had been expressed, the defendants would have contracted thus: "We buy for our principal; but if we do not disclose his name within a reasonable time, we agree that you may treat us as the purchasers." And it cannot be said that the latter branch is inconsistent with the former, any more than the power to return, subject to which the goods pass, is inconsistent with their passing. There is a case of *Bywater v. Richardson*,<sup>3</sup> which illustrates this. It was an action of deceit, for the breach of a warranty of soundness in the sale of a horse. The warranty was in writing, absolute and unconditional in its form, and the horse was unsound. Yet it was held an available defence to show that by a rule of the repository at which the horse was sold, known to the plaintiff, all warranties there given were to be in force only until twelve at noon on the day following

<sup>1</sup> *Yates v. Pym*, 6 Taun. 446.

<sup>2</sup> 1 Ad. & E. 503.

<sup>3</sup> *Blackett v. Royal Exchange Assur. Co.*, 2 Crompt. & J. 244; *post*, Chap. V.

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the sale, unless meantime a notice of the unsoundness, with a certificate from a surgeon, was delivered at the office. Here the rule, known to the parties, is exactly analogous to the usage of trade. The warranty did not in its terms import that it was binding for all time, exclusively of the rule. It was not, therefore, inconsistent with those terms to import a limitation of time; and, by virtue of the rule, it was held that the parties had implicitly imported it. *Browne v. Byrne*<sup>1</sup> has been so lately decided by us, and we there expressed ourselves so fully on this point, that we need do no more than refer to it. But our brother *Pigott*, in showing cause against the rule, cited, for the purpose of distinguishing it, the case of *Trueman v. Loder*;<sup>2</sup> and it is certainly a difficulty in his way, not as to the decision itself, which is quite consistent with our present observations, but in respect of a collateral matter there said to have been determined. That was an action for non-delivery of tallow. The sale was effected by a broker, one Woolner, acting for both parties, and signing both the bought and sold notes. In the former the purchase was described to be for Trueman & Cooke, the plaintiffs; in the latter the sale was expressed to be "for Mr. Edward Higginbotham, to my principals;" and the main struggle in the case was to make the defendant liable as trading under the name and through the instrumentality of Higginbotham; and there could be no doubt of the soundness of the principle on which that might be done, if the facts bore it out. But in the judgment it is stated that the defendant, on the trial, sought to put this question: "whether it was not a custom in the tallow trade that under such contracts a party may reject the undisclosed principal, and look to the broker for the completion of the contract," and that this question was not allowed to be put, which ruling the court confirms. How this question could have any bearing on the matter in issue, where the contract apparently disclosed both principals, and where the plaintiff was seeking to enforce it against a disclosed principal, — for such, as to the present point, *Loder* must be taken to have been, under another name, — it is certainly difficult to see; and this difficulty is pointed out in the judgment. In it the same principle was admitted on which the plaintiff here relies, but it was thought in the application of that principle that the term in question sought to be annexed to the contract would be inconsistent with its tenor. We do not cite *Hodgson v. Davies*,<sup>3</sup> as a legal decision, to be opposed to this. Lord DENMAN dealt with it in the judgment in question, and showed how little it can be supposed to carry with it of

<sup>1</sup> 3 El. & Bl. 703.

<sup>2</sup> 11 Ad. & E. 589.

<sup>3</sup> 2 Camp. 580.

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the weight of Lord ELLENBOROUGH's opinion. But we refer to it in connection with *Trueman v. Loder*, because both cases, we think, disclose how entirely the minds of lawyers are under a different influence from that which, in spite of them, will always influence the practice of traders, which practice creates the usages of trade. The former desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable; but merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of judges, they will continue to do so; and in a vast majority of cases, of which courts of law hear nothing, they do so without loss or inconvenience, and upon the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted in the present case that in fact this contract was made with the usage understood to be a term in it. To exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision.

Of course this could be no reason for a decision contrary to authority, but we think any one who reads the judgment of the court in *Trueman v. Loder*<sup>1</sup> with attention will perceive how much it was influenced by a feeling of the supposed inconvenience of receiving any parol evidence in the case of a written contract. And as it was not necessary to the decision of the case then before the court, we are not bound by it now; and we did not hold ourselves bound by it in the case of *Browne v. Byrne*,<sup>2</sup> when it was brought to our notice.

For the reasons we have given, we are of opinion that the evidence was receivable, and that the rule to enter a nonsuit should be discharged.

*Rule discharged.*<sup>3</sup>

<sup>1</sup> 11 Ad. & E. 589.

<sup>2</sup> 3 E.L. & Bl. 703.

<sup>3</sup> The judgment was afterwards affirmed

In the Exchequer Chamber, E.L. Bl. & E.L. 1004.

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## 27. TO INTERPRET WILLS.

RYERSS *v.* WHEELER.\**In the Supreme Court of New York, October, 1839.*HON. SAMUEL NELSON, *Chief Justice.*" GREENE C. BRONSON, } *Judges.*

" ESEK COWAN, }

A testator gave to certain devisees "all my back lands." *Held*, that parol evidence was admissible to designate the premises, as by showing that certain lands owned by him were usually known by that description to him, and among his family and neighbors.

THIS was an action of ejectment, tried at the Yates Circuit in December, 1838, before the Hon. DANIEL MOSELY, one of the circuit judges.

The plaintiffs claimed to recover one hundred and nine acres of land situated in the town of Milo, in the county of Yates, under a devise in the last will and testament of Gozen Ryerss, of Richmond, in this State, bearing date the 21st of October, 1800, in these words: "Item: I give and bequeath all my *back lands* to my grandchildren now living, and to those that may [be] born hereafter, share and share alike in severalty, each to receive his or her share as they respectively become of age, and to their heirs and assigns forever." By previous devises in the same will he had given sundry parcels of real estate, situate in the county of Richmond, to a son, daughter, and grandchild. The plaintiffs proved that the testator, Gozen Ryerss, was the owner of a tract of two thousand four hundred or two thousand six hundred acres of land in the vicinity of the court-house in Yates County; that these lands were called by the testator his *back lands*, and were also so called and known by his family and neighbors on Staten Island. The witness who proved this fact testified that his father-in-law, not the testator, who also resided on Staten Island, and himself, whilst he resided there, owned lands in the western part of this State, and that they also called their lands *back lands*. The whole of this evidence in relation to the name by which these lands were known, and particularly as to the declarations of the testator designating the lands as back lands, was objected to by the defendant's counsel, but the objection was overruled. The plaintiffs were nine in number, and the declaration contained nine counts. The sixth count was in the names of Gozen Adrian Ryerss and Thomas Baxter, claiming the whole of the premises in fee. There was evidence adduced to show title in all the plaintiffs named in the declaration as

\* Reported 22 Wend. 144.

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Ryerss v. Wheeler.

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derived from the grandchildren of the testator, but the plaintiffs' counsel finally abandoned all the counts except the sixth, and having succeeded in showing title in the plaintiffs named in that count to a moiety of the premises claimed, rested. The defendant's counsel thereupon moved for a nonsuit, on the grounds (1) that the plaintiffs had failed to show any title to the premises in question, by reason of the uncertainty of the term "back lands," and (2) that the plaintiffs named in the sixth count had shown title to only a *moiety*, whereas in the count they claimed the *whole* of the premises. The circuit judge granted a nonsuit, without stating the grounds upon which the order for the nonsuit was made. The plaintiffs ask for a new trial.

*H. Wells*, for the plaintiffs; *B. Davis Noxon*, for the defendant.

COWEN, J., delivered the opinion of the court.

I can hardly think the judge, in granting the motion for a nonsuit, laid any considerable stress upon the supposed variance between the proof and the sixth count. Whether the plaintiffs had made title in severalty or in common, the judge had a right to disregard the variance, in his discretion, and probably would have done so, though I admit this lay in his discretion.<sup>1</sup> Under the peculiar circumstances of this case, the plaintiffs may, if they shall be so advised, amend by adding counts or modifying those already in the declaration, in such a manner as to avoid any variance from the proof at the trial.

We are entirely satisfied that a new trial shall be granted on the first ground taken for a nonsuit. The term "back lands" was, it is true, insufficient of itself to designate any particular class of lands owned by the testator. It was uncertain, and might refer to different objects, or to none upon which any distinctive character could be fastened by extrinsic proof. But, *id certum est, quod certum reddi potest*. You must, in the most accurate description, go out of the instrument in order to apply it to the subject-matter of the devise or grant;<sup>2</sup> and, as far as we are able to collect from the evidence, that was effectually done in this case—at least, a jury might have so understood the testimony of Mersereau. The premises in question, and other lands in the same vicinity, were known and called by the testator during his lifetime, and by his family and neighborhood, *back lands*. This is like a man's making a map of his lands, on which he designates certain parcels by certain names, and then devises or conveys them accordingly. A nickname, or a name by reputation, given by the testator and current in his family and neighborhood,

<sup>1</sup> *Holmes v. Seely*, 17 Wend. 75, 79, 80; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 541, 542.

<sup>2</sup> *Wigr. on Extr. Ev.* 38, 41; 2 *Ph. on Ev.*

(8th London ed.) 731; 1 *Id.* (7th ed.), with notes by Cowen & Hill, note 957, p. 1399; *Sutherland, J.*, in *Jackson, ex dem. Lowell, v. Parkhurst*, 4 Wend. 374.



## Illustrative Cases.

is sufficient to designate the devisee, and why not the subject-matter devised.

The rule that, to be valid, a will or other writing must be certain in itself, has no application, except to such particulars as do not in their own nature refer to any thing *dehors* the instrument in question. A devise to A. and B., and *his heirs*, might be irremediably uncertain in respect to what heirs are intended. But the parcels in a devise always lie out of it, and must be sought by evidence *aliunde*. The search may, indeed, be unavailing, but still there is the right of search, and questions are thus every day raised for the jury.

The form of one of the objections at the trial seems to suppose that the testimony came within those cases which refuse the testator's declarations intended by him directly to explain the words of his will; and I agree that such declarations, especially if they were made at the time of framing the will, are not admissible. Sir JOHN LEACH, in *Goblet v. Beechey*,<sup>1</sup> rejecting the evidence of Mary Holt, which related to what Nollekins said at the time of her witnessing his will, Lord THURLOW said, very properly, in *Tonnereau v. Poyntz*:<sup>2</sup> "I lay out of the case all declarations of the testatrix of what she really meant to give at the time of making her will, and all state of her property from whence it might be inferred what she meant." But he immediately added: "You must hear evidence concerning the subject to which the will applies, in order to see whether the description applies aptly or not." All the cases agree that this latter rule lets in what the testator has done to his property in altering its nature or its form. His acts have thus left it within or taken it out of the description, and there are several cases that his declarations are admissible for the like purpose of applying the description. *Sandford v. Raikes*<sup>3</sup> will serve in a good measure to illustrate both propositions. The testator had ordered timber to be cut down on his Youlston estate to the value of £10,000; afterwards he devised a house, which he had before agreed for the purchase of, to one Sandford, and added in his will, "which [house] is to be paid for out of timber which I have ordered to be cut down." Sandford filed his bill to compel the application of the Youlston estate timber to the purpose of paying for his house. It was denied by the defendants that the will could be explained by evidence of what the testator had directed as to cutting down the timber. To which the Master of the Rolls (Sir WILLIAM GRANT) answered: "I had always understood that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascer-

<sup>1</sup> Wigr. on Extr. Ev. 151.

<sup>2</sup> 1 Bro. C. C. 477.

<sup>3</sup> 7 Mer. 646.



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Ryerson v. Wheeler.

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tain the fact, and through that medium to ascertain the subject of the devise. Here the question is not upon the devise, but upon the subject of it. Nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description of the thing devised. When there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given till it is shown by extrinsic evidence what estate it was purchased of A. or what farm was in the occupation of B. What is there in the fact here referred to—viz., an antecedent order for cutting down timber—that makes it less a subject of extrinsic evidence than such an one as I have alluded to? The moment it is shown that it was a given number of trees growing in such a place, or £10,000 worth in value of the timber of such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the will.”

Then, in respect to the name of an estate fixed by the declarations of the testator. In *Doe, ex dem. Beach, v. Earl of Jersey*,<sup>1</sup> the testator devised thus: “All my Briton Ferry estate, and all my P. C. estate, which, as well as my Briton Ferry estate, lies in the county of Glamorgan.” The court held that the devisee was not confined to the Briton Ferry estate lying within the county of Glamorgan, but might recover certain premises lying in Brecon, out of the parish of Briton Ferry, and out of Glamorgan, because the premises had been known and reputed as a part of the Briton Ferry estate. ABBOTT, C. J., said the words “‘all that, my Briton estate,’ etc., denote a property known to the testatrix by the name of her Briton Ferry estate.” Among other things, the entries of the stewards of the testatrix and her predecessors, in which they called the premises in question “Briton Ferry estate, in the county of Brecon,” were held to have been properly received at the trial. In short, the case was in principle precisely the one before us. Evidence was received, both of the testatrix’s own declarations and those made by her agent, the steward, and the reputed name under which the parcel was comprehended. ABBOTT, C. J., added that the question was one of parcel or no parcel, and the purpose of the evidence was so obvious that the judge did right in receiving it without the counsel being put to specify the object with a view to which it was offered. The case of *Hatch v. Hatch*<sup>2</sup> is also in point.

It is very common that neither the judge nor jury can understand the

<sup>1</sup> 1 Barn. & Ald. 550; in King’s Bench, 3 Barn. & Cress. 370; s. c. in House of Lords.

<sup>2</sup> 2 Hayw. 33.

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meaning of a word used to denote the subject of bequest or devise. The testator may express himself in a foreign language, or use terms with which, as a member of a particular trade or calling, he is familiar,<sup>1</sup> or in language which has a provincial or local meaning.<sup>2</sup> In either case, persons acquainted with the meaning of the words must be received as witnesses to translate or define them.<sup>3</sup> Nollekens, the sculptor, bequeathed "all the marble in the yard, the tools in the shop, bankers, 'mod.,' etc.," and sculptors were received to show that "mod." meant models, and then what the latter word was understood to import among sculptors.<sup>4</sup> I mentioned a devise to another by a nickname. In *Andrews v. Thomas*,<sup>5</sup> Sir LLOYD KENYON admitted you may prove that the testator usually called the devisee by that name. Again, in *Herbert v. Reid*,<sup>6</sup> the testator bequeathed £500 to Jane Herbert if in his service at the time of his decease. She lived with and served the testator some time, but left his house shortly before his death; and his declarations soon after she left were received to show that he still considered the legacy as her due, and that she was to return if he got well. And it was inferred, on the whole of what he said, that he did not consider her as having quit his service, though she had actually left the house. She therefore obtained a decree for the legacy.

So much for the declarations of the testator. They are clearly receivable as giving a name or character either to the devisee or the property devised; and that, too, as appears by the cases, whether such declarations be made before or after the will was executed.

In the case at bar, the name of the premises in question, as given by the testator when he talked of them, was "back lands." Sometimes he gave them another name, but I understand the evidence to be that he most usually called them "back lands;" and there can be no doubt that proof to show the prevalent name in his family and neighborhood, which was also "back lands," is admissible. None of the evidence given tended to, or detracted from the language of the will, but merely to explain and give meaning to that language. It was different in the case of *Doe, ex dem. Chichester, v. Oxenden*,<sup>7</sup> a case mainly relied on by the defendant's counsel. The devise there was, "I give my estate of Ashton." The testator had an estate which he used to call his Ashton estate, only a part of which was locally situate at Ashton. His declarations giving a name to the estate, and the acts of his steward, were

<sup>1</sup> Wigr. on Extr. Ev. 34, 35.

<sup>5</sup> 1 Cox, 225.

<sup>2</sup> Gresh. on Eq. Ev. 199.

<sup>6</sup> 16 Ves. 491.

<sup>3</sup> *Ibid.*

<sup>7</sup> 3 Taun. 147.

<sup>4</sup> *Goblet v. Beechey*, 3 Sim. 24; Wigr. on Extr. Ev. 139.

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denied as evidence that he intended to devise his whole Ashton estate. But this was on the ground that the words meant an estate locally situate at Ashton;<sup>1</sup> and to receive the testator's declarations going to show the contrary would, therefore, be to contradict the language of the will.<sup>2</sup> The learned writer thinks that the principle of adhering to local description was carried in this case to its utmost extent. But the decision was affirmed in the House of Lords.<sup>3</sup>

New trial granted, the costs to abide the event, with leave to amend *narr.* on same terms.

*New trial granted.*

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28. NOT ADMISSIBLE WHERE NO CONTRACT IS SHOWN.

TILLEY v. CITY OF CHICAGO.\*

*In the Supreme Court of the United States, October Term, 1880.*

HON. MORRISON R. WAITE, *Chief Justice.*

" JOSEPH P. BRADLEY,	} <i>Associate Justices.†</i>
" JOHN M. HARLAN,	
" SAMUEL F. MILLER,	
" STEPHEN J. FIELD,	
" WILLIAM B. WOODS,	

1. In the absence of a contract, evidence of usage and custom is irrelevant.

2. The authorized officers of a municipality having decided to erect a public building, offered prizes for the best plans, with cost, etc. T., an architect, was awarded one of the prizes, with notice that "the award should not be considered as indicating a preference for either of said plans, as to which should be finally adopted, from which the said building should be erected," and the amount of the prize (\$1,000) was paid to him. Subsequently, by resolution, the officers adopted T.'s plan, subject to conditions. *Held*, that this resolution was a voluntary act of the officers, and did not amount to a contract between them and T. *Held, further*, that in an action by T. against the officers, evidence of a usage and custom among architects that in the absence of a special contract the superintendence of the construction of a building belongs to the architect whose plans are adopted, and that where prizes for plans are offered the plans of the successful competitors belong to them, and if subsequently adopted as the plans to build by, they are always paid for in addition to the prize itself, was properly excluded.

In error to the Circuit Court of the United States for the Northern District of Illinois.

\* Not yet reported.

† Mr. Justice Clifford and Mr. Justice Hunt did not sit.

<sup>1</sup> *Per* Holroyd, J., in the course of the argument of *Doe, ex dem. Bench, v. Earl of Jersey*, 1 Barn. & Ald. 554; Gibbs, C. J., in

*Doe, ex dem. Oxenden, v. Chichester*, 4 Dow, 32 *et seq.*, in the House of Lords.

<sup>2</sup> *Wigr.* on Extr. Ev. 15, Prop. II. 19, 60.

<sup>3</sup> 4 Dow H. L. 65.

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Mr. Justice Woods delivered the opinion of the court.

This was an action of *assumpsit*, brought by the plaintiff in error in the Circuit Court of the United States for the Northern District of Illinois, jointly against the county of Cook and the city of Chicago. The declaration consisted of the common counts for work and labor done, goods sold and delivered, money lent and advanced, and upon account stated.

The following is a copy of the account sued on, which was appended to the declaration: —

*The County of Cook and the City of Chicago, to Thomas Tilley, Dr.*  
For services as architect in preparing plans, drawings, specifications, diagrams, estimates, and details for the new court-house and city hall, and superintendence of erecting the same, 5 per cent on \$2,909,629, the estimated cost of the building, the plan being that known as "Eureka" ..... \$145,481 45

The defendants pleaded the general issue.

By provision of the Constitution and laws of the State of Illinois, the county affairs of Cook County are managed by a board of commissioners of fifteen persons.<sup>1</sup> The affairs of the city are controlled by the Common Council.<sup>2</sup>

The county of Cook was the owner of a block of ground in the city of Chicago, known as the court-house square, on which it was proposed to erect a building, to be used as a city hall and county court-house, in which both the business of the city and county might be conducted.

On July 10, the Board of County Commissioners, and on July 15, 1872, the Common Council adopted, each for itself, the following resolution: —

"*Resolved*, That it is the sense of the joint meeting that they recommend to the Common Council of the city of Chicago and the Board of Commissioners of Cook County that the city of Chicago and the county of Cook will authorize the building committees of the several boards to offer a prize of five thousand dollars (\$5,000) for the best plan, two thousand dollars (\$2,000) for the second, and one thousand dollars (\$1,000) for the third best plan for a court-house and city hall, to be erected jointly by the county of Cook and the city of Chicago upon the public square in the city of Chicago, the said plans to be submitted to respective boards, in conjunction with the Board of Public Works of the city of Chicago."

<sup>1</sup> Const. Ill. 1870, Art. X., sect. 7.

<sup>2</sup> Priv. Laws Ill. 1863, p. 40.

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On August 5, 1872, the Common Council of the city and the Board of County Commissioners both passed an order providing for a joint contract between the city and county for the erection of a building on the court-house square, and on August 28, 1872, the contract was executed by the city and county authorities. It declared that it was for the public convenience that the courts and offices of the city "should be located at some one convenient point, and readily accessible to each other," and provided for the erection by the city and county of a public building on the court-house square, for the use of the county and city governments, respectively, and the courts of record; that the general exterior design of the building should be of such uniform character and appearance as might thereafter be agreed upon by the Board of County Commissioners and the Common Council of the city.

The contract further provided as follows: —

"3. That portion of the said building situate west of the north and south centre line of said block shall be erected by the city of Chicago at its own expense.

"4. The city of Chicago shall occupy that portion of said block west of the said centre line for a city hall, and offices incidental to the administration of the city government, and for no other purpose whatever, except as hereinbefore provided.

"5. Each of the parties will heat, light, and otherwise maintain and furnish its own portion of said building."

On November 25, 1872, the building committees of the Common Council and the County Commissioners published an advertisement calling for designs for the proposed building. The advertisement declared that, in order to secure suitable designs, the city and county jointly offered the following premiums: For the best design, \$5,000; for the second best, \$2,000; and for the third best, \$1,000. It provided as follows: "Each design must have a device or motto marked on each drawing, and be accompanied by a sealed letter giving the name of the author, which will be opened after the final award is made, only for the purpose of ascertaining the names of the successful architects, and for the return of the unsuccessful drawings to their authors. Each competitor will give the cubical contents of his building, and an estimate of the cost of the same complete."

Designs were submitted by a large number of architects, and the building committees of the City Council and the Board of County Commissioners made a report awarding the prizes. The plaintiff in error, who had adopted for his drawing the word "Eureka" as the device or motto to distinguish it, was awarded the third prize of \$1,000.

## Illustrative Cases.

On August 4 the County Board, and on August 18, 1873, the City Council, adopted the following resolution: "That the report of the majority of the joint committee awarding the prizes for plans of court-house and city hall shall be concurred in and the award confirmed: *provided*, that nothing herein or in said report contained shall be construed as indicating a preference for either of said plans, as to which shall be finally adopted, from which the said building shall be erected."

The plaintiff in error was paid the thousand dollars awarded to him as a prize.

Afterwards, on August 25, the County Commissioners, and on October 10, 1873, the City Council, adopted the following resolution: "That the plan known as 'Eureka,' or number 5 (five), in the collection submitted for court-house and city hall, be, and is hereby selected and adopted as the plan after which to build such court-house and city hall (the Board of Commissioners of Cook County concurring), subject to such change and modifications as may hereafter be determined upon by the Common Council of the city of Chicago and the County Board, provided the estimate of the architect who presented said plan, as to the cost of construction of the building, shall be verified."

Upon the trial of the case, the testimony tending to establish the facts above recited having been given in evidence by the plaintiff, he was sworn as a witness in his own behalf, and testified that he was an architect of fifteen years' standing; that he had made the design designated by the word "Eureka;" and that, after the passage by the City Council and Board of County Commissioners of the resolution last above mentioned, he had verified the cost of the construction of the proposed building in the way customary and usual with architects, which was made up at the rate of thirty-five cents per cubic foot for the building, and was indorsed by fourteen or fifteen architects.

The plaintiff produced before the jury all his plans for which the prize had been awarded him. He offered to prove their value, and offered to prove the time employed and expense incurred in the preparation of them. The court excluded the evidence so offered.

The plaintiff further offered evidence to establish that by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belonged to the architect whose plans were adopted. This was also excluded.

The plaintiff also offered evidence to prove that by the usage and custom of architects, where prizes for plans were offered, the plans of the successful competitors belonged to them; and, if subsequently adopted as the plans to build by, were always paid for in addition to



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the prize itself. To this defendants objected, and the court sustained the objection.

The plaintiff also offered evidence to establish the value of the services rendered in verifying the cost of the proposed building according to the "Eureka" plans, to which the defendants objected, and the court sustained the objection.

This was all the evidence given, or offered to be given in the cause.

The plaintiff then rested his case; whereupon the court directed the jury to find for the defendants.

The jury returned a verdict for defendants as directed by the court, and judgment was entered therein. To reverse this judgment this writ of error was brought. It will be observed that no evidence was introduced or offered to show that the plans of the plaintiff were used by the defendants, or either of them, or that the building for which they were used was ever erected. It is clear that if the plaintiff has any right of action it must arise on the resolutions adopted by the Board of County Commissioners August 25, and the City Council October 10, 1873. All that had taken place before those dates was the making of a contract between the city and the county, by which they agreed to join in the erection of a public building in the court-house square, each party to build and pay for its own part of the structure; an offer by the city and county of three prizes for the best plans; an award of the prizes, by which the third prize of \$1,000 was given to the plaintiff in error, with the distinct notice that "the award should not be considered as indicating a preference for either of said plans, as to which should be finally adopted, from which the said building should be erected," and the payment to, and the receipt by the plaintiff of the prize awarded him.

By the payment to the plaintiff in error of the prize, the defendants discharged every obligation due from them to him arising out of the preparation of plans for the proposed building. Upon that payment being made, no contract whatever, either express or implied, existed between the plaintiff and the defendants. If, therefore, the plaintiff had any right of action against defendants, it must have arisen by reason of the adoption of the resolution just mentioned, and what was done by plaintiff after its adoption.

The resolution was the voluntary act of the City Council and County Commissioners. It was not a proposition, but simply the expression of a purpose to build their structure after the plans of the plaintiff, subject to such changes and modifications as might thereafter be determined upon by the Common Council and the County Board. The resolution was not adopted at the instance or suggestion of the plaintiff. Suppose



## Illustrative Cases.

that the day after its adoption the resolution had been reconsidered and rescinded, would the defendants nevertheless have been liable for the value of the plans, and for five per cent on the estimated cost of the building for superintendence, amounting in the aggregate to near \$146,000?

Suppose a private person should announce his purpose to build a house after a design which he had seen in an architect's office, but before he begins the execution of his purpose, changes his mind, never calls for or uses the plans, or even builds the house, is he liable to the architect for the value of the plans and for superintendence? In such a case there certainly is no contract between him and the architect upon which a recovery can be based.

The claim of the plaintiff is, that by the adoption of the resolution by the City Council and the County Board, without any act done or assent on his part, they were bound to go on and erect the building on his plans, and expend \$2,909,000, its estimated cost.

The resolution did not bind the plaintiff to furnish his plans and superintend the building. There was no mutuality, and, therefore, no consideration, both of which are essential to a contract. Notwithstanding the resolution, the plaintiff might have said, "I will not furnish my plans, and I will not superintend the building," and the defendants would have had no claim on him.

If one does not accede to a promise as made, the other party is not bound by it.<sup>1</sup> When A. signs a writing by which he declares he will sell to B. his house at a certain price, this is a mere proposition, and not a contract.<sup>2</sup> In *Wood v. Edwards*,<sup>3</sup> where A. wrote that he had agreed to a substitute for an existing agreement, which he would execute, SPENCER, C. J., said the proposition of A. to execute the new agreement was not binding on him, as well on the ground of want of consideration as want of mutuality, since the plaintiffs on their part were not bound to execute the agreement. In the case of *Kingston v. Phelps*,<sup>4</sup> the plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award. Lord KENTON held there was no mutuality, and, therefore, the defendant's agreement was a mere *nudum pactum*.

An offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter upon the terms on

<sup>1</sup> Tuttle v. Love, 7 Johns. 470.

<sup>2</sup> Tucker v. Woods, 12 Johns. 139.

<sup>3</sup> 19 Johns. 305.

<sup>4</sup> Peake N. P. 227.

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which the offer was made. Any qualification of or departure from these terms invalidates the offer, unless the same be agreed to by the party who made it.<sup>1</sup>

In this case, there being only an expression of purpose by one party to erect a building according to plans antecedently made by another, and no obligation entered into by the other party, and no plans used or building erected, there was no contract between the parties, either express or implied.

If we are correct in this conclusion, then all the evidence offered by the plaintiff to prove the value of the plans, and the time employed and the expenses incurred in their preparation, was irrelevant and immaterial.

The only purpose for which such evidence could be admitted would be to prove the damage sustained by the plaintiff by the breach of his alleged contract with the defendants. But if he had no contract, express or implied, he was entitled to no damage, and could show none.

It is complained that the evidence offered to prove the custom of architects was excluded. We think it was rightly excluded. Proof of usage can only be received to show the intention or understanding of the parties, in the absence of a special agreement, or to explain the terms of a written contract.<sup>2</sup> In all cases where evidence of usage is received, the rule must be taken with this qualification: that the evidence be not repugnant to, or inconsistent with the contract.<sup>3</sup> The inference from these principles is inevitable, that unless some contract is shown, evidence of usage or custom is immaterial.

The plaintiff in error says he was ready to prove a custom of architects that when prizes were offered for plans of a building the successful competitor remained the owner of his own designs, and if they were adopted he was entitled to compensation therefor in addition to the prize, and that by the same custom the adoption of his plans entitled him to superintend the erection of the building, and to the usual remuneration therefor. He claims, therefore, that, in view of this custom, the adoption of his plans by the passage of the resolution referred to, by the city and county boards, amounted to a contract on the part of the defendants to pay for the plans, and employ him to superintend the erection of the building and pay him therefor.

<sup>1</sup> *Eliason v. Henshaw*, 4 Wheat. 225. See also *Welch v. Alton, etc., Ins. Co.*, 10 Ill. 225; *McClay v. Harvey*, 90 Ill. 525.

<sup>2</sup> *Hutchinson v. Tatham*, L. R. 8 C. P. 482; *Field v. Lelean*, 30 L. J. (Exch.) 168; *Baywater v. Richardson*, 1 Ad. & E. 508; *Robinson v. United States*, 13 Wall. 363.

<sup>3</sup> *Holding v. Pigott*, 7 Bing. 465, 474; *Clark v. Roystone*, 13 Mee. & W. 752; *Yates v. Pim*, Holt N. P. 95; *Trueman v. Loder*, 11 Ad. & E. 589; *Bliven v. New England Screw Co.*, 23 How. 420.

## Illustrative Cases.

The offer of the plaintiff in error to prove certain facts having been rejected, he must be presumed to be able to prove what he offered to prove. We must therefore assume that the custom which he offered to prove did in fact exist. But what was that custom? Clearly, that if the building was erected according to the successful plans the architect was entitled to pay therefor. That was such an acceptance and adoption of his plans as would give him the right to compensation therefor, and the right to superintend the erection of the building and receive the usual remuneration. The custom certainly did not bind the party who offered prizes for plans, after having paid the prizes, to pay also for plans that he never used, and for superintendence of a building that he never erected, merely because he had selected a particular plan and announced his purpose to build in accordance with it. If such were the custom and usage of architects in Chicago, it was an absurd and unreasonable custom, and therefore not binding.<sup>1</sup>

If the plaintiff in error had offered to show that, after the passage of the resolution by which his plan was accepted, the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent. But he made no such offer, and it is to be presumed no such fact existed. The evidence of this custom was therefore properly excluded.

The plaintiff in error complains that he was not allowed to prove the value of his services in verifying the cost of the proposed building according to his plans.

We think the court was right in excluding this evidence. There was no proof, nor any offer of proof, to show that the services of the plaintiff were rendered at the instance or request of defendants, or either of them. From all that appears, the services were voluntarily rendered by the defendant, and no use whatever was made of the results of his investigation. The law, therefore, does not imply a contract to pay for them, and proof of their value was quite immaterial.

The evidence rejected was properly excluded on another ground. The defendants were charged in the declaration with a joint liability, but there was no privity between them, either by law or contract. The evidence offered was to show a joint liability. So far as it went, it failed to do this; on the contrary, it was made to appear that each of the defendants was building its own part of the structure at its own expense, and for its own use. After the award and payment of the

<sup>1</sup> United States v. Buchanan, 8 How. 83; s. c. 3 Wash. C. Ct. 149.

## Parol Evidence — When Admissible.

prizes, they assumed no joint liability, as the evidence admitted clearly showed. And the evidence offered did not tend to establish a joint liability. It did not, therefore, support the case made in the declaration, and was properly excluded from the jury. As the plaintiff asked no leave to amend, this ruling of the court is not a ground of error.

We find no error in the record. The judgment of the Circuit Court must be affirmed.

*Judgment affirmed.*

## NOTES.

§ 179. *Parol Evidence not receivable to vary or contradict a Writing.* — It is a general and well-known rule of law that parol evidence cannot be received to contradict, vary, add to, or subtract from the terms of a written instrument.<sup>1</sup> This rule is, however, subject to the exceptions that a "latent ambiguity" may be explained,<sup>2</sup> or that it may be shown that a contemporaneous or supplementary agreement on a collateral matter had been entered into,<sup>3</sup> or that the instrument is void or of no effect because it was obtained by forgery

<sup>1</sup> *Goss v. Lord Nugent*, 5 Barn. & Adol. 64; *Meres v. Ansell*, 3 Wils. 275; *Ogilvie v. Foljambe*, 3 Mer. 53; *Attwood v. Small*, 6 Cl. & Fin. 232; *Besant v. Cross*, 10 C. B. 895; *Canie v. Horsfall*, 2 Car. & Kir. 349; *Clifton v. Walmsley*, 5 Term Rep. 564; *Henson v. Cooper*, 8 Scott N. R. 48; *Harnor v. Groves*, 15 C. B. 667; *Preston v. Merceau*, 2 W. Black. 1249; *Adams v. Wordley*, 1 Mee. & W. 374; *Perkins v. Young*, 16 Gray, 389; *Cocke v. Bailey*, 42 Miss. 81; *Kirk v. Hartman*, 63 Pa. St. 97; *Halliday v. Hart*, 30 N. Y. 474; *Erwin v. Saunders*, 1 Cow. 249; *Mott v. Richtmeyer*, 57 N. Y. 49; *Van Bokelen v. Taylor*, 62 N. Y. 105; *Heilner v. Imbrie*, 6 Serg. & R. 401; *Hagey v. Hill*, 75 Pa. St. 108; *Pennsylvania Canal Co. v. Betts*, 1 W. N. C. 328; *Gavinkel v. Crump*, 22 Wall. 308; *Eveleth v. Wilson*, 15 Me. 109; *Bromley v. Elliott*, 38 N. H. 287; *Bond v. Clark*, 35 Vt. 577; *Bleckley v. Munson*, 13 Conn. 299; *Rogers v. Colt*, 21 N. J. L. 704; *Young v. Frost*, 5 Gill, 287; *Hill v. Peyton*, 21 Gratt. 386; *Fankboner v. Fankboner*, 20 Ind. 62; *Johnson v. Pollock*, 58 Ill. 181; *Warren v. Crew*, 22 Iowa, 315; *Irish v. Dean*, 39 Wis. 562; *Ruiz v. Norton*, 4 Cal. 359; *Lemaster v. Burckhart*, 2 Bibb, 25; *Falconer v. Garrison*, 1 McCoord, 209; *Davis v. Moody*, 15 Ga. 175; *West v. Kelly*, 19 Ala. 253; *Laycock v. David-*

*son*, 11 La. An. 328; *Peers v. Davis*, 29 Mo. 184; *Koehring v. Moemminghoff*, 61 Mo. 403; *Richardson v. Comstock*, 21 Ark. 69; *Donley v. Bush*, 44 Texas, 1. See, further, *Greenl. on Ev.*, §§ 275-281; *Whart. on Ev.*, § 920 *et seq.*

<sup>2</sup> *Doe v. Hiscocks*, 5 Mee. & W. 363; *Rex v. Laiden*, 8 Term Rep. 379; *Cocker v. Guy*, 2 Bos. & Pul. 565; *Paddock v. Fradley*, 1 Crompt. & J. 90; *Norman v. Morrill*, 4 Ves. 760; *Grey v. Harper*, 1 Story, 574; *Goldshede v. Swan*, 1 Exch. 158; *Verzan v. McGregor*, 23 Cal. 339; *Hinnemann v. Rosenback*, 39 N. Y. 98; *Waymack v. Heilman*, 26 Ark. 449; *Wood v. Augustine*, 61 Mo. 46; *Baldwin v. Winslow*, 2 Minn. 213; *Fenderson v. Owen*, 54 Me. 374; *Stone v. Aldrich*, 43 N. H. 62; *Simpson v. Kimberlin*, 12 Kan. 579; *Jenkins v. Cooper*, 50 Ala. 419; *American Express Co. v. Schier*, 55 Ill. 140; *Lowry v. Adams*, 22 Vt. 160; *Conover v. Wardell*, 20 N. J. Eq. 266; *Davis v. Shaw*, 42 Md. 410; *Terrell v. Walker*, 69 N. C. 244; *Pointdexter v. Cannon*, 1 Dev. Eq. 373; *Armstrong v. Burrows*, 6 Watts, 266; *Insurance Co. v. Troop*, 22 Mich. 146; *Greene v. Day*, 34 Iowa, 328.

<sup>3</sup> *Lindley v. Lacey*, 17 C. B. (N. s.) 558; *Brady v. Oastler*, 3 Hurl. & Colt. 112; *Malpas v. London, etc., R. Co.*, L. R. 1 C. P. 336.

## General Rules.

or fraud,<sup>1</sup> or through duress,<sup>2</sup> or was made in furtherance of an illegal object,<sup>3</sup> or by persons incapable of contracting,<sup>4</sup> or that it was contingent on an event which is unperformed,<sup>5</sup> or that the consideration has failed,<sup>6</sup> or that it has been dissolved by a subsequent agreement.<sup>7</sup> It is not proposed to illustrate these different exceptions by any statement of the facts of the particular cases, as these questions are not within the scope of our examination, which in this chapter will be confined to the cases in which proof of usage and custom has been admitted by the courts, frequently to explain, and sometimes to change the ambiguous or the apparent meaning of written contracts.

§ 180. *Admissibility of Evidence of Usage—Views of Mr. Browne.*—Mr. BROWNE,<sup>8</sup> referring to the admissibility of evidence of usage to affect written contracts, says: "One of the most important questions which falls under our consideration in connection with a study of the law of custom is as to the admissibility of evidence of a usage for the purpose of modifying the meaning of a written contract. This question has to be practically answered upon very many occasions in modern courts of law, and the frequency with which this matter is brought under judicial notice is to be accounted for by our great commercial prosperity, which has increased the extent of our trade and the energy of those who are employed in it, and has produced an intense vitality in relation to the various conveniences of transaction, which has resulted in many useful and admirable customs which may well become a part of the common law of the land. Whenever a country is progressive, its laws tend to improve. But there is one incident of the improvement of a jurisprudence which it is of much importance to note in this place. As a country becomes more civilized, its criminal laws become less severe, but at the same time its laws of evidence seem to become less strict. Just as there is no necessity for heavy pains and penalties in a country where life and property are respected, where moral principle keeps the hands of the people from violence and from fraud, so, in a country where truth is common, where people have become intelligent enough to presume that a lie is always a mistake, there is not the same necessity for the strictness of proof which is felt in a less civilized community. Those who look

<sup>1</sup> *Collins v. Blantern*, 2 Wils. 341; *Prentiss v. Russ*, 16 Me. 30; *Grider v. Clopton*, 27 Ark. 244; *Horn v. Brooks*, 61 Pa. St. 407; *Burtner v. Keran*, 24 Gratt. 42; *Lull v. Cass*, 43 N. H. 62; *Franchot v. Leach*, 5 Cow. 508; *Mitchell v. McDougal*, 62 Ill. 498; *Jamison v. Ludlow*, 3 La. An. 492; *Montgomery v. Pickering*, 116 Mass. 227; *Wray v. Wray*, 32 Ind. 126; *Turner v. Turner*, 44 Mo. 535; *McLean v. Clark*, 47 Ga. 24.

<sup>2</sup> *Faxton v. Popham*, 9 East, 421; *Olivari v. Menger*, 39 Texas, 76; *Booley v. Shanner*, 26 Ark. 280; *Miller v. Miller*, 68 Pa. St. 488; *Hibbard v. Mills*, 46 Vt. 243; *Spaide v. Barrett*, 57 Ill. 289; *Knapp v. Hyde*, 60 Barb. 80; *Teller v. Green*, 26 Mich. 70; *Cadwallader v. West*, 48 Mo. 483.

<sup>3</sup> *Benyon v. Nettlefold*, 3 Mac. & G. 94;

*Waymell v. Reed*, 5 Term Rep. 600; *Briggs v. Lawrence*, 3 Term Rep. 454; *Norman v. Cole*, 3 Esp. 253; *Chamberlain v. McClurg*, 8 Watts & S. 31; *Shackford v. Newington*, 46 N. H. 415; *Williams v. Donaldson*, 8 Iowa, 109; *Corbin v. Sistrunk*, 19 Ala. 203; *Wyman v. Fiske*, 3 Allen 238; *Martin v. Clarke*, 8 R. I. 389; *Newsom v. Thighen*, 30 Miss. 414; *Lazare v. Jacques*, 15 La. An. 599; *Leppoc v. Bank*, 32 Md. 136.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Pierce v. Woodward*, 6 Pick. 206; *Shugart v. Moore*, 78 Pa. St. 469.

<sup>6</sup> *Foster v. Jolly*, 1 Crompt. M. & R. 707; *Solly v. Hinde*, 2 Crompt. & M. 516.

<sup>7</sup> *Goss v. Lord Nugent*, 5 Barn. & Adol. 84.

<sup>8</sup> *Browne on Usages & Customs*, 30.

## Mr. Browne's Views.

at the history of our laws of evidence will find ample illustrations of the truth of this proposition, and one chapter of that history might be written in connection with the way in which evidence of custom has been admitted in courts of law to annex incidents to, and to explain the meaning of written instruments.<sup>1</sup>

\* \* \* The reasons for the admission of parol evidence to explain a latent ambiguity in a writing are clear and strong; but where such an ambiguity can be explained by a reference to an existing custom, it is evident that such proof will have more authority than that which would attach to evidence of the party's intentions at the time the instrument was executed, or of his particular practice in relation to certain matters, as indicating what would probably be his intention in framing the document. In all cases it is difficult to arrive at a man's intention; and the only possible means of arriving at a correct conclusion with reference to his mental attitude is by a consideration of his words and actions. These, however, are apt to be misconstrued, even if they are accurately remembered and correctly repeated or described. On the other hand, the practice of all men is easy of proof, and there is the strongest presumption in favor of the supposition that he who wrote the document, the ambiguity of which has to be explained, did what every other body was doing — shaped his conduct according to the manners and usages of his time and district; and in that way, if a usage can be proved, the existence of which will explain the ambiguity, it is evidently the best means of arriving at a conclusion as to the intention of the individual, the explanation of whose agreement is in question. Thus it is that the proof of a custom in the explanation of an ambiguity in a written instrument is not only admitted, but must be regarded as parol evidence of the highest authority. As a fact, evidence of usage has been admitted, from very early times, in explanation of ambiguous grants and charters, and it has been decided that the construction of such a grant is for the jury, and not for the judge.<sup>2</sup> The real object of evidence under such circumstances is to place the court in the position of the parties to the instrument; and without the evidence of usage that would, in a large number of cases, be impossible.<sup>3</sup> 'In a certain sense,' as Lord CAMPBELL well remarked, 'every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far it is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and be different contracts.'<sup>4</sup> And in another case Mr. Justice BLACKBURN truly remarked: 'You do not need the evidence of custom unless it varies the contract, and makes it so far inconsistent with and different from that which it would be without the evidence of the custom.'<sup>5</sup> It may be added, that truly every incident which is sought to be attached by proof of usage is a material incident, and that, in fact, it is really the addition of a term to the contract as it existed in ink. Yet the law has gone on laying down the *dictum* that any usage which would have the effect of vary-

<sup>1</sup> Browne on Usages & Customs, 31.

<sup>2</sup> Baird v. Fortune, 7 Jur. (N. S.) 926; Waterpark v. Fennell, 7 H. L. Cas. 650.

<sup>3</sup> Doe v. Bevis, 18 L. J. (C. P.) 628; Beaufort v. Swansea, 3 Exch. 413; Newcastle-on-Tyne v. Bradley, 2 El. & Bl. 423; Withnell v.

Gratham, 1 Esp. 322; Wadley v. Bayliss, 5 Taun. 752; *post*, Chap. V.

<sup>4</sup> Browne on Usages & Customs, 32.

<sup>5</sup> Humfrey v. Dale, *ante*, p. 342.

<sup>6</sup> Myers v. Sari, 3 L. J. (Q. B.) 15.



## Explanation of Technical Terms.

ing or contradicting, either expressly or by implication, the terms of a written contract, is inadmissible as evidence.<sup>1</sup> The difficulty of understanding how a usage which adds an incident to a written contract is to do so without varying it, or without contradicting it to the extent that the assertion of something concerning which it is silent is a contradiction, is, to our mind, very great. That it has been the means of throwing an element of uncertainty into the minds of many judges, will appear from the nature of some of the decisions.<sup>2</sup>

\* \* \* We cannot see that the principles of the law have suffered by the greater breadth which is thus given to interpretation of documents which have a decided tendency to be too narrow for the intentions of the parties, who, from their great familiarity with the incidents to the contracts they are daily in the habit of entering into, are apt to leave a great part of the contract understood, and put only a little of the less familiar matter into writing. Were the law to refuse to give effect to these understandings, it would really be refusing to give effect to the real intentions of the parties at the time the contract was entered upon. It would likewise be throwing difficulties in the way of important transactions which are often too urgent to be fully expressed in lengthy documents, and would be doing something to prevent the regenerative effects on law which may be looked for from custom. There is a possibility of too lax an admission of custom as a force in such cases. The common business relations of others must not be regarded as so stringent as to bind any one to perform his business in the same way. Each man is to be left free to contract in what way he pleases, but when the interpretation of a usage is possible in connection with a written agreement, it is as fair to conclude, on the side of one of the parties, that the contract was made with reference to it, as on the other side to infer that it was made without any reference to it, and with the intention of excluding its effect. Thinking thus, we cannot see that the law has suffered in any respect from the extension which has been allowed to the common conduct as interpreting the common transactions of men. Guarded by the consciousness that these customs are apt to push their way into the statute-books, — and we believe that it is well to be careful how they attain that position, — little evil can arise."<sup>3</sup>

§ 181. **Usage may explain Technical or unintelligible Terms.** — As Horace has put it, custom is at once the arbiter and standard of language. The customs of particular classes of men soon give to particular words different meanings from those which they may have among other classes, or in the community generally. Mercantile contracts are commonly framed in a language peculiar to merchants, and hardly understood outside their world. Agreements which are entered into every day in the year between members of different trades and professions are expressed in technical and uncommon terms. The intentions of the parties, though perfectly well known to themselves, would be defeated were the language employed to be strictly construed according to its ordinary meaning in the world at large. Hence it was soon established by the courts as a rule of construction that while words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary, and

<sup>1</sup> *Menzies v. Lightfoot*, 40 L. J. (Ch.) 581; L. R. 11 Eq. 459.

<sup>2</sup> *Browne on Usages & Customs*, 80.

<sup>3</sup> *Id.* 89.



## Classification of the Cases.

popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary, and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense, and that sense may be fixed by parol evidence.<sup>1</sup> In very many cases, words and phrases which, if interpreted in their ordinary dictionary sense, would cause an instrument to be ambiguous or meaningless, may be read in connection with proof of a usage so as to make the written contract perfectly intelligible. This has been repeatedly done in courts of law. Where the word has two meanings, — one common, the other technical, — this evidence is necessary, in the first place, to raise the presumption that the parties intended to use it in the latter rather than in the former sense, unless, as we have said, this fact can be inferred from reading the whole instrument.<sup>2</sup> But plain words have a stronger presumption in their favor than ambiguous ones; and, therefore, it has been laid down that when it is sought to vary the meaning of such words, the evidence of custom should be very strong.<sup>3</sup> The evidence is not incompetent because the words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the parties in a different sense.<sup>4</sup> What words are more plain and unambiguous on their face than such words as "a thousand," "a week," "a day?" Yet, as we shall see, "a thousand" has been held to mean twelve hundred;<sup>5</sup> "a week," a week only during a portion of the year;<sup>6</sup> "a day," only a working-day.<sup>7</sup> And, therefore, words technical or ambiguous on their face, or foreign or peculiar to the sciences or the arts, or to particular trades, professions, occupations or localities, have been explained, in a number of cases where they were employed in written instruments, by parol evidence of usage.<sup>8</sup>

§ 182. *Classification of the Cases.* — The cases in which evidence of this character has been admitted are considered at length in the succeeding sections, in which the adjudications have been classed on the basis of the different trades and callings in which the usages were formed and the different instruments in

<sup>1</sup> "The words of a written contract are to be understood in that sense which the phrase has acquired in the trade with regard to which it is used. It is the *prima facie* presumption that it was the intention of the parties to use it in that sense; and, having expressed themselves in a written contract making use of the phrase, it is *prima facie*, as a matter of construction of the contract, to be taken that they used the phrase in the particular limited sense which it has acquired in the trade. That peculiar and limited sense, if such an one had been acquired, must be shown by parol evidence; and this having been shown, then the presumption is that that was the sense in which the parties making the contract used it. In order to introduce this extrinsic evidence, it is not necessary that the phrase should be at all, on the face of it, ambiguous." Black-

burn, J., in *Myers v. Sarl*, 30 L. J. (Q. B.) 9; 7 Jur. (N. S.) 97.

<sup>2</sup> *Shore v. Wilson*, 9 Cl. & Fin. 355; *Attorney-General v. Drummond*, 1 Dr. & War. 363; *Drummond v. Attorney-General*, 2 H. L. Cas. 837.

<sup>3</sup> *Lewis v. Marshall*, 1 Man. & G. 104.

<sup>4</sup> *Myers v. Sarl*, 30 L. J. (Q. B.) 9; 7 Jur. (N. S.) 97; *Brown v. Byrne*, 3 Esp. 103.

<sup>5</sup> *Smith v. Wilson*, *ante*, p. 33.

<sup>6</sup> *Grant v. Maddox*, 15 Me. & W. 737.

<sup>7</sup> *Cochran v. Retberg*, 3 Esp. 121.

<sup>8</sup> *Hill v. Evans*, 31 L. J. (Ch.) 457; *Grant v. Maddox*, 15 Me. & W. 737; *Barlow v. Lambert*, 28 Ala. 704; *Smith v. Clayton*, 29 N. J. L. 357; *Hartwell v. Camman*, 10 N. J. Eq. 128; *Seymour v. Osborne*, 11 Wall. 516; *Moran v. Prather*, 23 Wall. 492; *Williams v. Woods*, 16 Md. 220; *Eaton v. Smith*, 20 Pick. 150; *Broadwell v. Broadwell*, 6 Ill. 599.

## Adding Unexpressed Terms.

the interpretation of which they were admitted. This arrangement may appear to merit the criticism which it has received.<sup>1</sup> It would seem that the mere fact that the usages were in themselves different would be nearly as intelligible a ground of classification as the one adopted. Nevertheless this is the arrangement of the digesters, and it must be admitted that no really scientific classification is possible. We must ask the reader to bear in mind that the legal principles which are to determine the admissibility or inadmissibility of usages and customs by courts of law are the same in all relations; that there can be no difference, because in one case the usage is admitted to explain the meaning of a technical word in a manufacturer's receipt, or in another to expound the doubtful meaning of a term in the contract of a carrier or an insurer. Keeping this in view, the classification which we have adopted is believed to be the best, because it renders the access to particular precedents more easy and ready in future cases.

§ 183. Usage admissible to add unexpressed Terms to written Contracts. —

At first admissible only to explain the meaning of technical terms in written contracts, the office of a usage soon became more extended. It was not long before it was recognized by the courts that it was as necessary to allow usage to explain what was purposely not said as what was carelessly ill-expressed. Experience taught that in the hurry and bustle of bargain and trade, and in all the transactions of busy men, only a portion of the real bargain was actually written out. In all contracts as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages. They commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included, however, as of course by mutual understanding.<sup>2</sup> If, as was remarked by MAULE, J., in the course of the argument of one case,<sup>3</sup> a party was to contract with another to convey a lion, there could be no doubt that evidence would be admissible to show that it was customary to put animals of that description into cages. And so usage was allowed not only to explain, but to add tacitly implied incidents to the contract in addition to those which were actually expressed.<sup>4</sup> It will appear, from a comparison of the cases, that it is not an easy thing to distinguish those cases which have been decided on the ground that the usage explained the writing, from those which have been looked upon as adding terms or incidents to it. Where only half a thing is expressed, there is real ambiguity in the writing, which can only be fully explained by the addition of a term or incident.

<sup>1</sup> Browne on Usages & Customs, 74.

<sup>2</sup> Coleridge, J., in *Brown v. Byrne*, 3 El. & Bl. 703. Therefore, where it is said, as in *Dickinson v. Gay*, 7 Allen, 29 (and see *Wetherill v. Neilson*, 20 Pa. St. 448), "There is no necessity for such usages, because if the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale; or, if the manufacturer sells without warranty, he can so express it," one of the main grounds for admitting such evidence is entirely lost sight of.

<sup>3</sup> *Robertson v. Jackson*, 2 C. B. 412.

<sup>4</sup> *Sotlichos v. Kemp*, 3 Exch. 105; *Kempson v. Boyle*, 3 Hurl. & Coll. 763; *Vliet v. Campbell*, 13 Wis. 198; *Lord Abinger v. Ashton*, L. R. 17 Eq. 358; *Ex parte Conway*, 4 Ark. 302, 367; *Buckner v. Real Estate Bank*, 5 Ark. 536; *Worthington v. Curd*, 15 Ark. 491; *Jones v. Bradner*, 10 Barb. 193; *Lawrence v. Gallagher*, 10 Jones & Sp. 309; *Wilson v. Randall*, 67 N. Y. 338; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Robinson v. Fiske*, 25 Me. 401.

## Annexing Incidents to Contracts.

Where there is palpable ambiguity, the effect is the same. The addition of a term, or the explanation of the terms which are there written, gives a meaning to the writing which it did not possess without this expert evidence.<sup>1</sup> And, as will be seen in another chapter,<sup>2</sup> the usage or custom must not be of a character which is repugnant to, or inconsistent with the written contract. But that it merely varies the written contract is not enough to make it inadmissible, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less.<sup>3</sup>

§ 184. Incidents annexed to Contracts generally. — It is remarked by Mr. BROWNE<sup>4</sup> that the fact that usage is permitted to annex incidents to written contracts is another proof of its relationship to the common law. Law annexes various incidents to contracts, and these differ from those annexed by usage only in the circumstance that they claim their own recognition without proof, while the others have to be evidenced. It may be useful shortly to allude to some of these, although many may be in the immediate memory of the reader. In contracts for the sale of estates, whether freehold or leasehold, the law, in the absence of express stipulation, it will be remembered, implies an undertaking on the part of the vendor that he will make out a good title,<sup>5</sup> and an undertaking on the part of the vendee that if the title prove defective, the damages to which he shall be entitled shall be limited to the expenses actually incurred in the investigation, and shall only be nominal for the loss of the bargain.<sup>6</sup> So, on a demise of real property the law annexes a condition that the lessor has a good title to the premises, and that the lessee shall not be evicted during the term;<sup>7</sup> but it does not imply from the nature of the contract a warranty that the property leased, whether it be a house or land, shall be in a proper state to admit either of habitation or cultivation, or that in other respects it shall be reasonably fit for the purposes for which it is taken.<sup>8</sup> Again: in relation to marine insurance we have an instance of this legal annexation of incidents. One of these is that in every voyage-policy, whether it be on a ship or on goods, a warranty of seaworthiness at the commencement of the risk is implied. These further conditions are also understood as forming a tacit part of the contract: that the voyage is to be commenced in a reasonable time, and that all material circumstances are to be disclosed. If these conditions are not performed, this omission will render the policy void, whether the omission has been due to fraudulent motives or not.<sup>9</sup> We might add other illustrations, but these are sufficient to show the method by which usage annexes incidents to written contracts.

§ 185. Incidents added by Usage cannot establish a Contract. — But, though to contract an incident varying or explaining it may be added by proof of usage, the incident alone is not sufficient to establish the contract. Thus, in

<sup>1</sup> Browne on Usages & Customs, 63.

<sup>2</sup> *Post*, Chap. V.

<sup>3</sup> Brown v. Byrne, 3 El. & Bl. 703.

<sup>4</sup> Browne on Usages & Customs, 95.

<sup>5</sup> Senter v. Drake, 5 Barn. & Adol. 992; Doe v. Staixton, 1 Mee. & W. 695; Hall v. Betty, 4 Man. & G. 410; George v. Pritchard, Ryan & M. 417.

<sup>6</sup> Flureau v. Thornhill, 2 W. Black. 1073; Walker v. Moore, 10 Barn. & Cress. 416; Robinson v. Harman, 1 Exch. 855; Worthington v. Warrington, 8 C. B. 134.

<sup>7</sup> Sutton v. Temple, 12 Mee. & W. 64.

<sup>8</sup> *Ibid.*; Hart v. Windsor, 12 Mee. & W. 63; Smith v. Marrable, 11 Mee. & W. 5.

<sup>9</sup> Gibson v. Smith, 4 H. L. Cas. 393.

## Nor Supply Disputed Terms.

an action of ejectment against a tenant, the demise being laid on the 1st of January, 1849, the plaintiff claimed that the defendant entered into possession of the premises in 1848, as his tenant, and produced evidence to establish this. The defendant, in order to show that the tenancy had expired at the date of the alleged demise, offered to prove that it was the general usage in the place for all leases to expire on the next day before the 1st of each January. This evidence was admitted, but erroneously, as was held on appeal to the Supreme Court. "The custom," said NASH, J., "is admissible in proof, not for the purpose of establishing a contract, but to add an incident not expressly embraced in it, and in reference to which the parties are presumed to have contracted. Thus, if the lease in this case was made on the 1st of February, 1849, or from the 1st of January, 1849, for and during that year, the plaintiff would be permitted to show that by the usage and custom of Greenville all leases made within the town, and so terminating, expired on the day preceding the 1st of January. In that case the custom would transport into the contract an incident upon which it was silent, but with respect to which the parties must be presumed to have contracted. But before the incident can be so engrafted, the contract as made must be proved; the incident cannot be used to establish the contract. The expiration of a lease is as much a matter of contract as its commencement. \* \* \* The contract of lease in this case may have been for one month, two months, or six months, and whether the custom was applicable or not would depend upon the term agreed for."<sup>1</sup>

And see particularly on this point the late case of *Tilley v. City of Chicago*.<sup>2</sup>

§ 186. That Parties differed as to the Usage does not destroy the Contract.—The fact that parties to a contract had a different understanding concerning the usage governing it, does not bring the case within the cardinal rule in the law of contracts that where the minds of the parties do not meet as to its subject-matter or its essential terms there is no binding contract, for the difference is only as to its legal effect.<sup>3</sup>

§ 187. Usage not admissible to supply disputed Terms.—Where a contract is by word of mouth, and the controversy is not as to the meaning of the terms used by the parties, but as to what precise terms had been in fact used, evidence of custom is not admissible. Thus, in an action by a marble-worker to recover the value of a marble monument sold by the plaintiff to the defendant, to be erected on the grave of her husband, it appeared that the monument, having been finished, was taken away by the defendant's son, and subsequently the plaintiff went to the defendant's residence to superintend its erection. It was broken in the process of erection, and the question on the trial was whether, by the terms of the contract, the plaintiff was merely to make and deliver a monument at his shop, and to assist at its subsequent erection, or whether he was to erect it before it was to be considered as delivered. On this the evidence was conflicting. It was held that evidence was not admissible to show what was meant in the trade of a marble-worker by a contract to erect a monument.<sup>4</sup>

<sup>1</sup> *Moore v. Eason*, 11 Ired. L. 508.

<sup>2</sup> *Ante*, p. 356.

<sup>3</sup> *Souder v. Bradbury*, 106 Mass. 422.

<sup>4</sup> *Sanford v. Rawlings*, 43 Ill. 92.

## Contracts of Sale.

§ 188. **Contracts of Sale—Usage as to Quality and Description of Goods.**—In the various trades and manufactures, contracts entered into for the purchase or sale of goods and merchandise are best interpreted by the usages of those trades and manufactures. The meaning of technical terms, or of words not in themselves technical except when used in a particular trade, has been explained by evidence of usage in many cases, sometimes where the question was one of quality or description, sometimes where it was one of quantity or price, or the like. Thus, in *Swett v. Shumway*,<sup>1</sup> the plaintiffs contracted with the defendants for the manufacture of certain goods described in the contract as "all the horn chains they manufacture." The defendants contended that these words implied a warranty that the chains should be made wholly of horn, and that there was a failure to comply therewith if part of the links were made of hoof; but the plaintiffs were allowed to show that chains of the latter kind were known as horn chains in the market. This ruling, on appeal, was held to be correct. "There are many articles," said COLT, J., "which are named from one of several different materials of which they are made. A contract, for example, to furnish gold watches or mahogany furniture would not be construed to require the whole watch to be of gold or the whole piece of furniture to be mahogany. In the admission of the evidence offered by the plaintiffs on this point, the true rule was applied by the court." Similarly, in *Robinson v. United States*,<sup>2</sup> a merchant agreed to deliver to the United States commissary department "1,000,000 bushels of first quality clear barley." There being no specification in the agreement as to the manner in which the barley was to be delivered, it was held in the Supreme Court of the United States that evidence was properly admitted to show that it was the custom of the trade to deliver grain in casks. Again: in a New Jersey case, a party agreed to deliver to another a number of trees, "not to be less than one foot high," and it was held competent for the defendant to show that by the universal custom and usage of all dealers in such articles the length was measured only to the top of the ripe wood, rejecting the green, immature top.<sup>3</sup>

In *Baker v. Squier*,<sup>4</sup> an action was brought for a refusal to receive goods sold to the defendant by a bought-and-sold note, in which the goods were described as two hundred and twenty-five tons "kurty, 48 to 50 per cent carbonated soda-ash." The soda-ash had been tendered, accompanied with a certificate of quality from H. & A., a firm of chemists. The defendants refused to accept it, on the ground that it was not of the quality called for. On the trial, it was held competent to show that it was the universal custom of the trade, in contracts for soda-ash, to determine the quality by tests by certain recognized chemists, whose certificate was attached to the invoice and was received by dealers as evidence of the quality, and that the firm of H. & A. were among those recognized chemists, and their certificate was recognized by the trade as a compliance with such a contract. "We think," said the Supreme Court, on appeal, "the custom was properly admitted in evidence. A person engaged in a particular trade is presumed to be acquainted with the usages of that trade and to contract with reference to them, and the usage of the trade in which the contract is made may be shown to explain the meaning of a particular contract,

<sup>1</sup> 102 Mass. 165.

<sup>2</sup> 13 Wall. 363.

<sup>3</sup> *Barton v. McKelway*, 22 N. J. L. 165.

<sup>4</sup> 1 Hun, 448; 3 N. Y. S. O. (J. & S.) 463.

## Usage as to Quality and Description.

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but not to contradict its plain terms. The figures 48 to 50 per cent convey no meaning to a person ignorant of the subject-matter of the contract and of the usages of the trade in which it was made, and the evidence of the custom was to explain the meaning of those terms or figures when used in such a contract, and did not tend to vary the import of the contract so far as its terms are expressed." And where a person, by written contract, conveyed to another "a certain milk-route, \* \* \* and the right and good-will of supplying twenty-six full eight-quart cans of custom," it was held that the latter might show that these words, in the milk trade, mean, when applied to sales of the trade, the right of supplying milk to the customers furnished and pointed out by the vendor from those accustomed to buy milk of him.<sup>1</sup> So, where one contracted to sell "1,170 bales of gambier," and the purchaser refused to receive the bales, evidence was held admissible to show that by the usage of the trade a bale of gambier was understood to mean a package of a particular description, and that the contract was not satisfied by a tender of packages of a totally different size and description.<sup>2</sup> And on a sale of "18 pockets Kent hops, at 100s," evidence may be given that by the usage of the hop trade a contract so worded means 100s a hundred-weight.<sup>3</sup>

A party made a contract in the following form: "Glasgow, 28th March, 1850. We hold one hundred tons of No. — pig-iron, deliverable free on board to the bearer of this document only on presentation." In construing this contract, it was held by the House of Lords that it was proper to show that by mercantile usage in Glasgow, and the mode in which persons dealing in that commodity would construe the document, "pig-iron" meant "Clyde and Dundee iron."<sup>4</sup>

The English Court of Appeal, as appears from a late case not yet reported,<sup>5</sup> were recently somewhat puzzled to decide whether evidence of usage could be admitted to show that, in the dry-goods trade at least, "white" sometimes meant "black." The question arose in an action for the infringement of a trade-mark. The plaintiffs had registered a trade-mark for worsted stuffs. It was advertised in the *Trade-Marks Journal* of the 13th of January, 1877, and was thus described: "A white selvage on each side of the piece, having a red and white mottled thread interwoven the full length of the selvage, between the edge of the piece and the edge of the selvage." No representation of the trade-mark was printed in the journal, as is usually the case, but the following note was added to the description: "A specimen of this mark is now on view at the patent-office museum, South Kensington." The specimen deposited at the museum was an undyed specimen of the goods to which the plaintiffs applied the mark. The goods were mohair goods, and were known in the market by the name of "Brilliantine." When sold, they were dyed black, but the deposited specimen was undyed. The woof of the whole piece, as undyed, was white mohair. The warp of the body of the piece was black mohair. The warp of the selvage was composed entirely of white cotton, with this exception: that

<sup>1</sup> Page v. Cole, 120 Mass. 37.

<sup>2</sup> Gorrisen v. Perrin, 2 C. B. (N. S.) 681.

<sup>3</sup> Spicer v. Cooper, 1 Q. B. 424. "In this case the contract was either simply, 'at 100s,' in which case evidence was admissible to explain in what sense such words are used in the trade, or it is a perfect contract, 'at 100s per pocket,' in which case

evidence is admissible as to the sense in which the trade understood the word 'pocket,' so used." Denman, C. J., in Spicer v. Cooper, *supra*.

<sup>4</sup> Mackenzie v. Dunlop, 8 Macq. H. L. Cas. 26.

<sup>5</sup> Mitchell v. Henry, noted in 24 Sol. J. 639.



## Contracts of Sale.

between the inside and outside edges of the selvage, and at a distance from the inside edge equal to about one-third of the whole width of the selvage, there ran the "red and white mottled thread" mentioned in the description in the journal. The appearance of the undyed fabric was light gray, with a white border, a red and white line running through the border. When dyed, the whole fabric (including the selvage) appeared to be black, but the selvage was not of so deep a black as the rest of the piece. The red and white thread became, when dyed, of a very dingy hue, but was perfectly distinguishable. The defendants manufactured goods of a similar description, using, however, in their selvage a mottled thread of three colors — red, yellow, and white — instead of two, and placing this thread along the inside edge of the selvage. When undyed, their goods were of a darker gray than those of the plaintiffs, and the selvage was rather gray than white. When dyed black, there was scarcely any difference between the appearance of the plaintiffs' and the defendants' goods, except in the position of the mottled thread in the selvage, though the defendants' selvage was of a somewhat lighter hue than the plaintiffs'. The plaintiffs alleged that the defendants' selvage was an imitation of theirs, and by their writ they claimed an injunction to restrain the defendants from infringing it. The plaintiffs moved for an *interim* injunction until the trial of the action, and JESSEL, M. R., refused the application, holding that there had been no infringement. He said that the plaintiffs had registered a white selvage as their trademark, while they were actually using a black selvage. This was fatal to their claim. Moreover, the defendants were using a black selvage, and that could not be an imitation of what the plaintiffs had registered, which was a white selvage. There was also the difference between the defendants' mottled thread and that of the plaintiffs'. Evidence had been adduced to prove that the selvages actually used by the plaintiffs and the defendants, though nearly black in appearance, were known in the trade as white selvages. But his lordship refused to look at this evidence, and said that no amount of evidence would convince him that black was white. He accordingly dismissed the motion with costs. The Court of Appeal (JAMES, COTTON, and THESIGER, L.JJ.) were of opinion that this was not the proper mode of disposing of the case. They held that the plaintiffs ought to be allowed to show by the evidence of experts that the term "white selvage," as understood in the trade, would include the selvage actually used by the plaintiffs.

Evidence of usage among dealers has been admitted to show the meaning of "season," in a contract to purchase and deliver corn "on board our boats the coming season;"<sup>1</sup> to show the meaning of "product," in an instrument which recited: "Received from teams in our pork-house, No. 114 West Harrison Street, 280 hogs, weighing 45,545 pounds, the product of which we promise to deliver to the order of Messrs. Stevens & Bro., indorsed hereon. G. & J. Stewart;"<sup>2</sup> to show the meaning of "good custom cowhide boots," in an agreement to pay for a number of those articles at a certain price;<sup>3</sup> to show what is called for on a contract to deliver "winter-strained lamp-oil,"<sup>4</sup> and on a contract to deliver "good merchantable hay;"<sup>5</sup> to explain the meaning of "prime logs;"<sup>6</sup>

<sup>1</sup> Myers v. Walker, 24 Ill. 133.

<sup>2</sup> Stewart v. Smith, 29 Ill. 397.

<sup>3</sup> Waite v. Fairbanks, Brayt. 77.

<sup>4</sup> Hart v. Hammett, 18 Vt. 127.

<sup>5</sup> Fitch v. Carpenter, 43 Barb. 40.

<sup>6</sup> Spring v. Cockburn, 19 Upper Canada C. P. 63.



## Usage as to Quantity and Price.

to show that the words "with all faults," in a contract for the sale of hides, mean all that are not inconsistent with the identity of the goods;<sup>1</sup> that, under a contract to build a "drawbridge," it is the common understanding among persons skilled in bridge-building that the bridge should be so constructed as to be easily turned in two or three minutes by one man;<sup>2</sup> that "cider," in a contract of sale, meant the juice of the apples as soon as pressed;<sup>3</sup> that "gas-fixtures," in a contract, did not include meters;<sup>4</sup> that a certain glass is known in the market as "German cylinder glass;"<sup>5</sup> that "300 bales S. F. drills, 7½, 100 cases blue do., 8½," mean the first quantities at seven and a quarter, and eight and three-quarter cents a yard;<sup>6</sup> that in a contract "to saw lumber, and to retain any spoiled," "spoiled lumber" is such as is rendered unmarketable;<sup>7</sup> that "mess-pork of Scott & Co." means mess-pork manufactured by Scott & Co.;<sup>8</sup> that oil is "wet" if it contains any water, however little.<sup>9</sup> And the following terms in written contracts of sale have been explained by parol evidence of usage: "Pitch-pine timber of average quality;"<sup>10</sup> "copper-fastened vessel;"<sup>11</sup> "No. 1 log;"<sup>12</sup> "good team," in a contract for a mower which should be "capable, with one man and a good team, of cutting and raking off from twelve to twenty acres of grain a day;"<sup>13</sup> "best E. F. F. madder;"<sup>14</sup> "150 tons soft English lead, of W. P. & W. brand;"<sup>15</sup> "fresh seed," in a contract for onion seed.<sup>16</sup>

§ 189. *Same—Usage as to Quantity and Price.*—So as to quantity and price. In *Goodrich v. Stevens*,<sup>17</sup> the defendant and one Smith entered into a written contract in these words: "Bought of H. P. Smith his crop of flax, 200,000 pounds, at 25 cents per pound, dressing to be equal to best of last year's work." An action being brought for the defendant's refusal to receive and pay for two hundred thousand pounds of flax tendered by Smith, the plaintiff's assignor, it appeared that the flax which Smith had tendered was not all raised by him,—about one-half had been bought of other persons,—but he held the whole two hundred thousand pounds at the time of making the contract. The defendant justified his refusal on the ground that the contract called for two hundred thousand pounds of flax raised by Smith himself. The plaintiff thereupon offered evidence to show that by the usage in this trade the words "my crop" and "his crop" are used to signify the amount of the current year's production which the party contracting to deliver has on hand at the time of making the contract, by purchase as well as by production; but the court excluded it, and the plaintiff was nonsuited. On appeal, the ruling was reversed, the Supreme Court holding that the evidence should have been received. In *Miller v. Stevens*,<sup>18</sup> the plaintiff contracted to sell to the defendants "1,000 barrels of petroleum oil," and it was held competent to show that the word

<sup>1</sup> *Whitney v. Boardman*, 118 Mass. 243.

<sup>2</sup> *Railroad Co. v. Smith*, 21 Wall. 262.

<sup>3</sup> *Studdy v. Sanders*, 5 Barn. & Cress. 628.

<sup>4</sup> *Downs v. Sprague*, 1 Abb. App. Dec. 550.

<sup>5</sup> *Mixer v. Coburn*, 11 Mete. 559.

<sup>6</sup> *Salmon Falls Man. Co. v. Goddard*, 14 How. 446.

<sup>7</sup> *Harris v. Rathbun*, 2 Keyes, 312.

<sup>8</sup> *Powell v. Horton*, 2 Bing. N. C. 668.

<sup>9</sup> *Warde v. Stuart*, 1 C. B. (N. S.) 88.

<sup>10</sup> *Jones v. Clarke*, 2 Hurl. & N. 725.

<sup>11</sup> *Shepherd v. Kain*, 5 Barn. & Adol. 200;

*Schneider v. Heath*, 3 Camp. 506.

<sup>12</sup> *Busch v. Pollock*, 41 Mich. 64. And see

*Hopkins v. Sanford*, 41 Mich. 243.

<sup>13</sup> *Sanson v. Madison*, 15 Wis. 144.

<sup>14</sup> *Dana v. Fiedler*, 1 E. D. Smith, 463.

<sup>15</sup> *Pollen v. Le Roy*, 10 Bosw. 38; 30 N. Y.

549.

<sup>16</sup> *Ferris v. Comstock*, 33 Conn. 513.

<sup>17</sup> 5 Lans. 230.

<sup>18</sup> 100 Mass. 518.

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Contracts of Sale.

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"barrel" meant a vessel of a certain capacity, and not the statute measure of capacity.

The principal case of *Smith v. Wilson*<sup>1</sup> has been followed in Missouri. In *Soutier v. Kellerman*,<sup>2</sup> decided in 1853, the plaintiff, alleging that he bought of the defendant 4,000 shingles, and that he received eight bundles, which contained only 2,500, and that he had paid for 4,000, brought suit to recover the value of the 1,500 not delivered. The defence was that by the custom of the lumber trade two packs of a certain size are regarded as 1,000 shingles, and are always bought and sold as such without any count of the number, and that the eight bundles delivered to plaintiff were, according to the custom, properly reckoned as 4,000 shingles. The defendant asked the court to declare the law to be: "1. That if the shingles sold to the plaintiff were in ordinary-sized packs, and that the price paid was a reasonable one for such kinds of packs, and that such packs are, by common custom, sold two for a thousand, then the plaintiff is not entitled to recover. 2. If the common custom of the lumber trade is to sell two bunches of shingles as a thousand, without regard to actual count, then the plaintiff must be presumed to have had notice of such general custom, and to have purchased accordingly." This the court refused, but declared that "if the contract was at so much per thousand, and not so much per bundle, and no express agreement was entered into that two bundles should represent a thousand, then the defendant must deliver the four thousand, or else account to the plaintiff for their value." On appeal to the Supreme Court, this ruling was declared to be erroneous and the judgment reversed. "The usage of a particular trade," said GAMBLE, J., who delivered the opinion of the court, "is evidence from which the intention and agreement of the parties may be implied; and although it cannot control an express contract, made in such terms as to be entirely inconsistent with it, yet in express contracts the terms employed may have their true meaning and force best understood by reference to such usage. Evidence of such usage is admitted, not to vary the terms of an express contract or to change the obligation, but to determine the meaning and obligation of the contract as made. The usage must appear to be so general and well established that knowledge of it may be presumed to exist among those dealing in the business to which it applies; so that the contract of the parties may be taken to have been made with reference to it. In this country, many articles which are in terms sold by the bushel (a dry measure containing eight gallons) are in fact sold by weight, the bushel being understood to mean a certain number of pounds, and the number of pounds differing in different articles—as, salt, wheat, etc. When such custom becomes general and well established, so as to be known to the community, it is obvious that a contract for a given number of bushels must mean the bushel as ascertained by weight, whether in fact the number of pounds of the article sold would measure more or less than the real bushel." The judge then cites *Smith v. Wilson*, and proceeds: "In the present case, there was evidence that a general custom prevailed in the lumber trade of estimating two packs of shingles of certain dimensions as a thousand shingles, without reference to the number of pieces in the pack. If such was the usage of the trade, so general and well established that those buying and selling might be presumed to deal in reference to it, there does not appear to have been

<sup>1</sup> *Ante*, p. 335.

<sup>2</sup> 18 Mo. 506.

## Usage as to Quantity and Price.

any such contract shown in this case as would prevent the usage from applying. The law commissioner seems to have thought that the defendant could not escape from liability, if the contract was at so much per thousand, unless there was an *express* agreement that two bundles should represent a thousand. This was an incorrect statement of the law in a case where evidence was given of a general usage that a thousand shingles meant two packs of certain dimensions. Whether there was as full evidence of the usage given as ought to have been given, is not a question upon which we pass; but there was evidence of the usage, upon which the party was entitled to have the law differently declared if the evidence proved the usage as general, well established, and known, so that contracts might be presumed to be made with reference to it. It was not necessary that the defendant should show an *express agreement* that two bundles should represent a thousand." Where a contract called for "sixty thousand cubic feet square white-oak lumber," a custom in the market to reject fractions of a foot in its measurement was held admissible.<sup>1</sup> Where logs are to be sold at a certain price for so much lumber as they are "estimated" to make, the mode of estimating is to be shown by custom.<sup>2</sup> Again: A. agreed, in writing, to deliver to B. five hundred tons of copper ore, to be paid for at certain specified prices per ton, according to the quality of the ore, to be ascertained by an assay thereof, "the moisture to be deducted, as usual, from the weight of the ore." B. claimed that under the contract A. was bound to deliver a quantity of ore weighing five hundred tons after deducting for the moisture, while A. insisted that he was only bound to deliver five hundred tons of ore, gross weight, without any deduction for the moisture, and that the proviso in regard to such deduction related only to the mode of ascertaining the weight of ore to be paid for. It was held that either party might show a custom in the sale of copper ore corresponding with their respective claims as to the construction of the contract.<sup>3</sup>

It is competent to show by commercial usage that the words "net balance" mean the balance of the proceeds after deducting the expenses incident to the sale;<sup>4</sup> that the words "terms cash," in a bill of goods, imply that a discount would be made if it was paid in six months;<sup>5</sup> that the words "consigned 6 mo." mean that the goods were consigned if returned in six months, but that if not so returned they were regarded as sold;<sup>6</sup> that "about" so many tons of hemp has a definite meaning when used in a delivery order;<sup>7</sup> that a contract for the sale of gold "short" means a sale of that which the seller does not at the time have, but which he expects to be able to purchase at a lower price;<sup>8</sup> that on a contract for lumber, in the phrase "one thousand feet in each raft," the words "one thousand feet" mean linear measure;<sup>9</sup> that the word "honored" means paid, and not accepted, in the phrase in a merchant's letter, "when the bills are duly honored;"<sup>10</sup> that upon a note payable in cotton-yarn, at "wholesale factory prices," a certain discount is allowed by manufacturers and dealers.<sup>11</sup> So, parol

<sup>1</sup> Merrick v. McNally, 26 Mich. 374. And

see McGraw v. Sturgeon, 29 Mich. 426.

<sup>2</sup> Heald v. Cooper, 8 Me. 32.

<sup>3</sup> Humphreysville Copper Co. v. Vermont Copper-Mining Co., 33 Vt. 92.

<sup>4</sup> Evans v. Waln, 71 Pa. St. 69.

<sup>5</sup> George v. Joy, 19 N. H. 544.

<sup>6</sup> Ibid.

<sup>7</sup> Moore v. Campbell, 10 Exch. 323.

<sup>8</sup> Appleman v. Fisher, 34 Md. 540.

<sup>9</sup> Brown v. Brooks, 25 Pa. St. 210.

<sup>10</sup> Lucas v. Groning, 7 Taun. 164.

<sup>11</sup> Avery v. Stewart, 2 Conn. 69. "These words, I confess," said Gould, J., in this case, "would seem to me *prima facie* to import the actual wholesale market prices

## Miscellaneous Cases.

evidence of usage has been admitted to show the meaning of "your wool," in a written offer to buy "your wool, 16s per stone, deliverable at Liverpool;"<sup>1</sup> to show the meaning of the words "ex boats Spencer and Galt," in a contract for "two boats Western mixed corn in B.'s stores, Clinton Wharf, ex boats Spencer and Galt;"<sup>2</sup> to show the meaning of "season," in a contract for the delivery of grain "the coming season;"<sup>3</sup> of "month;"<sup>4</sup> of "for shipment in June or July;"<sup>5</sup> of "to be paid for in from six to eight weeks;"<sup>6</sup> of "on freight;"<sup>7</sup> of "bale;"<sup>8</sup> of "six per cent off for cash."<sup>9</sup>

So, a usage of selling certain goods at a discount may be shown to explain an item in an account.<sup>10</sup>

Abbreviations and ambiguous expressions as to price in a written contract are properly explained by proof as to the customary meaning of such characters or contractions. Thus, in one case, "40 of 3—58s;"<sup>11</sup> in another, "five per cent advance;"<sup>12</sup> in another, "best madder, 12½;"<sup>13</sup> in another, "at the rate of 100 + dolls. per ton;"<sup>14</sup> in another, "cost;"<sup>15</sup> in another, "cost price;"<sup>16</sup> in another, "cas,"<sup>17</sup> were interpreted by evidence of usage.

§ 190. *Same — Other Cases.* — In many other cases of mercantile contracts of sale, evidence of custom has been admitted in accordance with the rules laid down by WILDE, C. J., in *Spartali v. Benecke*,<sup>18</sup> viz.: that it is competent (1) to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from the sense which they ordinarily import; (2) for the purpose of annexing incidents to the contract in matters upon which the contract is silent; (3) both these rules being subject to the limitation or qualification that the

at the factory. But if this or any other similar term is by the common consent and general usage of all dealers in a particular branch of business used in a different sense, and so understood by their customers, there can be no reasonable objection to a party's proving it by parol. It is like the common case of any term of measure or quantity used in particular branches of business in a sense different from the common one, and, like any other latent ambiguity, may be explained by parol evidence."

<sup>1</sup> *Macdonald v. Longbottom*, 1 El. & Bl. 975.

<sup>2</sup> *Hay v. Leigh*, 48 Barb. 393. And see *Rhoades v. Castner*, 12 Allen, 130.

<sup>3</sup> *Myers v. Walker*, 24 Ill. 133.

<sup>4</sup> *Simpson v. Margiston*, 11 Q. B. 32.

<sup>5</sup> *Alexander v. Vanderzee*, L. R. 7 C. P. 530.

<sup>6</sup> *Ashforth v. Redford*, L. R. 9 C. P. 20.

<sup>7</sup> *Outwater v. Nelson*, 20 Barb. 29.

<sup>8</sup> *Taylor v. Briggs*, 2 Car. & P. 525.

<sup>9</sup> *Linsley v. Lovely*, 26 Vt. 123.

<sup>10</sup> *Sager v. Tupper*, 38 Mich. 258. The plaintiff in this case sought to recover the sum of \$174.35 as the amount he had paid for a belt he purchased for defendants. A bill for this belting had been made out, in which the price appeared to be \$174.35. There also

appeared upon this bill the words and figures, "less expense account, \$47.46;" and this amount was claimed to be a discount from the regular price-list. One of the witnesses called by defendants was asked, after testifying that he had purchased leather belting, the custom relative to selling belting at a discount from the price-list. This was objected to as irrelevant and immaterial, but the court permitted the question, and its ruling was approved on appeal.

<sup>11</sup> *Cooper v. Smith*, 15 East, 103.

<sup>12</sup> *Cole v. Wendel*, 8 Johns. 116.

<sup>13</sup> *Dana v. Fiedler*, 12 N. Y. 41.

<sup>14</sup> *Taylor v. Beavers*, 4 E. D. Smith, 215.

<sup>15</sup> *Gray v. Harper*, 1 Story, 574. And see *Buck v. Burk*, 18 N. Y. 337.

<sup>16</sup> *Herst v. Comeau*, 1 Sweeny, 590. The term "cost" is a relative one, and differs in its meaning according to the circumstances under which it is used. Thus, the cost price to an importer is one thing; to a jobber or middle-man, another; to a retailer, another; and to a purchaser from a retailer, still another.

<sup>17</sup> Meaning "cashier." *Farmers and Mechanics' Bank v. Day*, 13 Vt. 36.

<sup>18</sup> 10 C. B. 212.

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peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract must not vary or contradict, either expressly or by implication, the terms of the written instrument.<sup>1</sup>

In *Spartali v. Benecke*,<sup>2</sup> decided in the English Court of Common Pleas in 1850, a contract for the sale of thirty bales of goats' wool contained the following stipulation: "Customary allowance for tare and draft, and to be paid for in cash in one month, less five per cent discount;" and evidence was held inadmissible to show that, by the usage of that trade, sellers selling under such contracts were not bound to deliver the goods without payment. "The objection to the admissibility of the evidence," said WILDE, C. J., "is that the incident sought to be annexed by such evidence is inconsistent with and contradictory to the express terms of the contract, and by those terms, if not expressly, certainly by implication, excluded. The contract states, in terms, the precise time when the price is to be paid, — 'in a month,' — and to require payment before that time is obviously inconsistent with that stipulation." But this case was subsequently criticised in the Court of Exchequer Chamber.<sup>3</sup> In *Lucas v. Bristow*,<sup>4</sup> decided in the English Court of Common Pleas in 1858, the plaintiffs sold to the defendants "fifty tons best palm-oil, expected to arrive," "per the Chalco," "at £40 10s per ton," "wet dirty, and inferior oil, if any, at a fair allowance." The oil, on arrival, was found to contain only one-fifth of the best oil, and the defendant refused to accept, whereupon the plaintiff brought his action. It was a question as to what was the intention of the parties, and it was taken that in entering into the contract they had purposely left undefined what was to be the proportion of "wet, dirty, and inferior oil." As ERLE, J., remarked, "They were both engaged in the palm-oil trade, and would be aware that there was great doubt as to the proportions of good and inferior oil in each cargo; and, therefore, they may well have made the contract on the understanding that such portion should not be specified." There was one established usage in the palm-oil trade as to what proportions would satisfy a contract to deliver "best" palm-oil, and evidence of this usage was admitted to explain what was left undefined in the contract. So, by a contract made at S., between A., who resided in that place, and B., who resided in London, B. sold to A. a cargo of St. Giles Marlas wheat, free on board at a French port. The grain was unknown at S., but was shown to be known elsewhere in the trade to contain a mixture of barley. But, although such evidence was offered at the trial, the judge refused it unless it could also be shown that the fact was well known at S. This ruling was held to be erroneous.<sup>5</sup> *Cockburn v. Alexander*,<sup>6</sup> decided in the Common Pleas in 1848, is hardly reconcilable with these rulings and with the current of authority. There, a ship was chartered to bring home a cargo of wool, tallow, bark, and other merchandise. The bark was not to exceed fifty tons, the tallow and hides not to exceed eighty tons, and the ship was to deliver the same on being paid freight as follows: "For wool, one penny, half-penny per pound, and one penny, half-penny, and one eighth of a penny per pound unpressed." For the other three articles separate rates were fixed, and

<sup>1</sup> Wilde, C. J., in *Spartali v. Benecke*, 10 C. B. 212.

<sup>2</sup> *Supra*.

<sup>3</sup> See *Field v. Lelean*, 6 Hurl. & N. 617.

<sup>4</sup> El. Bl. & El. 907.

<sup>5</sup> *Ryder v. Wooley*, 10 Week. Rep. 294.

<sup>6</sup> 6 C. B. 791.

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the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party. The ship returned with a full cargo, consisting of a small portion only of wool, and the residue tallow, bark, hides, and other legal merchandise. The court held that there was no ambiguity upon the face of the contract, and refused to receive parol evidence for the purpose of showing that, by the custom of the place of loading, the cost of pressing wool was to be borne by the ship-owner.<sup>1</sup> In *Fawkes v. Lamb*,<sup>2</sup> a written contract for the sale of goods was silent as to the time for which warehouse-room rent was allowed by the seller to the purchaser, and it was held competent to show this fact by evidence of custom. "The written contract," said BLACKBURN, J., "is quite silent as to any allowance of warehouse rent, but it was open to either side to show that by general custom a certain allowance for warehouse rent was incorporated in all such contracts. The plaintiff, who was willing to allow one month's rent, called evidence to prove that one month was the amount of the customary allowance. It was open to the defendant to call evidence to prove that the custom was to allow two months, but he did not seek to do this. What he desired to do was to prove that though the written contract was silent as to any allowance of rent, the parties had, by word of mouth, agreed to make a certain allowance different from the customary allowance. This was an attempt to add to the written contract by parol, and such evidence was not admissible." This case is an instructive one, as showing the greater value of evidence of usage over that of any other kind of parol evidence. In *Field v. Lelean*,<sup>3</sup> decided in the Exchequer Chamber in 1861, upon the purchase and sale by brokers of shares in a mine, they signed bought-and-sold notes, the former of which was in these terms: "Bought T. F.  $\frac{250}{5120}$  shares in Wheal Charlotte, at £2 5s per share, £562 10s for payment, half in two months and half in four months." In an action for not accepting the shares, evidence of a usage amongst brokers that on the sales of mining-shares the seller is not bound without contemporaneous payment, was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought-and-sold notes, payment of the price was to be made, half in two and half in four months, and nothing was there said as to the time of delivery. In that case it was argued that the case of *Spartali v. Benecke*<sup>4</sup> was directly in point in favor of the defendant, and WILLIAMS, J., in his judgment, said: "It may be observed that in that case, although the written instru-

<sup>1</sup> Mr. Browne criticises, and, we think, justly, the conclusion in this case. Might not such proof, he asks, have been written into the written contract without making it nonsensical, or inconsistent with itself, and is not that the true test of its admissibility? Does not the knowledge that there was such a usage in this case, just as in the others, introduce an ambiguity from the fact that the written contract does not say enough? To us there seems nothing in the nature of this contract which should have been regarded as impliedly excluding such proof. We can quite understand that such an implication may arise. We know that it is

only in trades which have a settled course of business that usages can exist; if, therefore, a transaction, even although in the course of such a trade, deviated from the ordinary course of that trade, — if it was unusual in any of its incidents, — then the presumption that the parties had been acting in the light of ordinary custom would not arise, but a presumption of a contrary nature would be the ruling thought. Browne on Usages & Customs, 69.

<sup>2</sup> 31 L. J. (Exch.) 163; 8 Jur. (N. S.) 335.

<sup>3</sup> 6 Hurl. & N. 617; *Godts v. Rose*, 17 C. B. 229.

<sup>4</sup> 10 C. B. 213.



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ment of sale was, *mutatis mutandis*, the same substantially as in the present, the usage relied on was different. In the present, it was simply that the delivery is to take place at the appointed time for payment, and not before. In *Spartali v. Benecke*, the usage relied upon was that the delivery was to be at the option of the buyer, and that he might require it at any time before the appointed day of payment, but in no case without payment of the price. Therefore, it was a case where I apprehend that WILDE, C. J., in his judgment, treated the usage as varying the time for payment expressed in the statement of the contract, inasmuch as, according to that usage, the delivery intended by the contract might take place so as to give the seller a right to call for payment before the time specified in the written instrument. But according to the usage proved in the present case no delivery can be required, or is intended to take place, before that time arrived. If *Spartali v. Benecke* cannot be distinguished in this way, I agree it ought to be overruled." In another case, proof that by a custom of trade, when timber is sold in bond at a sale by auction in London, the buyer contracts to buy at a price including the duty payable, and he may, by giving notice on the following day so to do, elect to take the timber in bond, and if he does so, he is then only bound to pay the price less the duty, was admitted under the following circumstances: On the 10th of February, 1860, the defendant bought timber in bond at a sale by auction, at a price including the duty, the contract to be completed within fourteen days, and the Chancellor of the Exchequer, on the evening of that day, gave notice that a resolution would be moved in Parliament to reduce the duty on timber, and carried out that resolution on the 8th of March. An act of Parliament passed to that effect on the 5th of May, and the reduction of the duty was thereby made to date from the 8th of March. On the 11th of February the defendant gave notice to the seller that he elected to take the timber in bond, and on the 24th of February offered the price, less the then duty, which the seller refused to take, and he also refused to give a delivery order for the timber. He subsequently brought an action for the price of the timber, in which judgment was given for the defendant, on the ground that the usage, which was admitted, added a term to the contract.<sup>1</sup>

In a packer's receipt for goods, containing the phrase, "Received on account of Bowman & Lay, for J. Makinson," the words "for J. Makinson," being ambiguous, were explained at the trial by evidence of the usage of trade. "There is an ambiguity," said ABINGER, C.B., "in the language of the instrument; the defendant is to hold them for one person, and yet on account of another. I think this falls within the general rule that upon a mercantile instrument you may give evidence of usage in explanation of an ambiguous expression."<sup>2</sup> So, evidence of custom may be introduced to show that a person whose name appears at the head of an invoice as vendor is not in fact a contracting party.<sup>3</sup> And, as a case where an invoice was explained by usage, *Schrieber v. Horsley*<sup>4</sup> deserves attention. The action was for goods sold and delivered, the defence being that the time of credit had not expired. The goods were sold, accompanied with an invoice which contained the following memorandum as to terms: "Terms, £2 10s per cent monthly." On the trial, the defendant proposed to give evidence to show that under this invoice he was at liberty to draw a bill at the

<sup>1</sup> Clark v. Smallfield, 4 L. T. (N. S.) 405.<sup>2</sup> Bowman v. Horsey, 2 Man. & R. 85.<sup>3</sup> Holding v. Elliott, 5 Hurl. & N. 117.<sup>4</sup> 11 Jur. (N. S.) 675.



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expiration of the first two months, or to leave it an open account and have the option of paying at one-third of £2 10s per cent discount, and at the expiration of the third month for net cash, but the learned judge refused to admit it, and the plaintiff had a verdict. The defendant's counsel afterwards moved for a new trial, on the ground that the evidence was improperly rejected, saying that the defendant was prepared to prove that £2 10s per cent was the governing discount, and that the buyer paying at the end of two months was entitled to it, and was at liberty to give a bill at three months, or to open an account on a graduated scale of discount—two-thirds at the end of two months, one-third at three. He contended that the custom of the trade proved that such was the meaning of the words. A rule *nisi* was therefore granted, which was afterwards made absolute, for a new trial, MARTIN, B., saying: "The invoice is not the contract, but is only evidence of it. It is couched in language which is not intelligible without some explanation, and I think we ought to receive as complete an explanation as possible." In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade all sales are by sample, although the bought-and-sold notes were entirely silent on this point.<sup>1</sup>

§ 191. **Principal and Agent—Usage and Custom.**—In the leading case of *Humfrey v. Dale*,<sup>2</sup> the plaintiff, a broker, brought an action against the defendant, a broker, upon a written contract for the sale of oil, in which neither of the principals' names was set forth, and proved a custom in the trade that when a broker purchased without disclosing the name of his principal he was liable to be looked to as principal; and the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, held that the evidence was admissible, on the ground that it added to the contract a tacitly implied incident.<sup>3</sup> In *Hutchinson v. Tatham*,<sup>4</sup> the defendants, acting as agents for a person of the name of Lyons, with his authority chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made and was signed by the defendants as "agents to merchants," the name of the principal not being disclosed. At the trial, evidence was tendered on the part of the plaintiff, and admitted, of a trade usage that if the principal's name is not disclosed within a reasonable time after the signing of the charter-party, in such case the broker shall be personally liable. The jury found that there was such a custom, and that the name of the principal had not been disclosed within a reasonable time. The question for the court was as to the admissibility of the parol evidence; and the judges, while restating the doctrine that no such evidence would be admissible to contradict the plain terms of a document, held that it was the law that you might, by evidence of custom, add a term not inconsistent with any term in the contract, and that the evidence which was admitted at the trial was rightly admitted. In *Fleet v. Murton*,<sup>5</sup> the defendants were fruit-brokers in London, and were employed by the plaintiffs, who were merchants, also in London, to sell for them. The defendants gave to the plaintiffs the fol-

<sup>1</sup> *Syers v. Jones*, 2 Exch. 111; *Boorman v. Johnston*, 12 Wend. 566; *Oneida Man. Co. v. Lawrence*, 4 Cow. 444.

<sup>2</sup> *Ante*, p. 343.

<sup>3</sup> *El. Bl. & El.* 1004.

<sup>4</sup> *L. R. 3 C. P.* 432.

<sup>5</sup> *L. R. 7 Q. B.* 126, *ante*, p. 90.

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lowing contract-note: "We have this day sold for your account to our principal." Then followed a statement of the number of tons of raisins, signed Murton & Webb, brokers, 25 Mincing Lane. The defendants' principal having accepted part of the raisins, and refusing to accept the rest, the plaintiffs brought an action on the contract against the defendants, and endeavored to make the defendants personally liable, by giving evidence that, in the London fruit-trade, if the brokers did not give the names of their principals in the contract they were held personally liable, although in fact they contracted as brokers for a principal. It was held that the evidence of the custom was not inconsistent with the written document, and COCKBURN, C. J., said: "For, although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet if a man—though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself—chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another, and giving to another rights under the contract, he himself will incur the same liability as the principal. Now, although where a party professes to contract as broker it might, *prima facie*, be taken that he contracts without the intention of incurring liability on his own part, yet if by the custom of the particular trade there is that qualification of the contract which, if written into the contract *in extenso*, would undoubtedly bind him, that qualification may, I think, be imported into the contract by evidence of the custom." And evidence is admissible to show that the word "agent," in the piano trade, includes those who buy and sell pianos on their own account.<sup>1</sup>

In *Allen v. Sundius*,<sup>2</sup> the defendants, a firm of ship-brokers, being employed by an agent of the French government to procure for them the charter of two ships, a person named Lamont, who was also a ship-broker, informed the defendants of two ships, called the New York and the Glasgow, which could be chartered. After considerable negotiation and a good deal of correspondence between the three,—Lamont, the defendants, and the owners of the ships,—the New York was chartered for three months, and the following letter was thereupon written by the defendants to Lamont:—

"LONDON, November 10, 1854.

"Mr. R. Lamont, Liverpool.

"SIR: In consideration of your having introduced us to Mr. Langlands, and assisted us in procuring the charter for the screw steamship New York, we hereby engage to allow you two and a half per cent ( $2\frac{1}{2}$ ) out of our commission as we receive it.

Your obedient servants,

"SMITH, SUNDIUS & CO."

Subsequently the Glasgow was also chartered, and the charter of the New York was renewed for another six months. The assignees of Lamont then claimed commission at the same rate on the charter of the Glasgow, and also on the renewed charter of the New York, and on the trial proposed to prove a usage of trade among ship-brokers by which an "introducing broker" was entitled to share the commission on all renewals by the same parties of charters effected through his introduction; but the chief baron rejected it, being of opinion that it was inconsistent with the agreement contained in the letter to Lamont, and the plaintiffs took a nonsuit. In the Court of Exchequer, a rule for

<sup>1</sup> Whittemore v. Weiss, 33 Mich. 349.

<sup>2</sup> 1 Hurl. & Colt. 123

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Principal and Agent.

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a new trial was made absolute. "I am of opinion," said BRAMWELL, J., "that the rule ought to be absolute. There are two questions, both of which I shall briefly advert to. One arose thus: The bankrupt Lamont said: 'I introduced you, the defendants, to certain ship-owners, and you procured a charter for them from the French government; and part of the bargain between us was that I was to receive a portion of your commission,' viz., £2 10s per cent, which I believe is the ordinary commission allowed to 'introducing brokers,' as Lamont was called. Lamont also said: 'The French government has renewed the charter with the ship-owners, and you, the defendants, have received a repetition or renewal of your commission upon this renewed charter, and I claim from you a repetition or renewal of my commission, and I will prove there is a custom which entitles me to make that claim.' Evidence to that effect was tendered, and rejected by my lord, I think, erroneously. There is no doubt about the principle. A custom may be annexed to documents with which it is not inconsistent. The question then is, whether this custom is inconsistent with the written agreement between Lamont and the defendants. If inconsistent, or incoherent with the agreement, it cannot be annexed to it. It seems to me it would be coherent with it, because, as I understand the bargain between Lamont and the defendants, it was this: 'I will receive from you £2 10s per cent as my share of your commission.' To my mind, there would have been nothing inconsistent if, that being in writing, the writing had gone on to say, 'not only upon the first charter, but upon any renewed charter in respect of which you may get any commission from the ship-owners.' Whether the evidence, if admitted, would have proved that agreement it is not necessary to say. I think such a custom ought to be narrowly watched; but nevertheless I think that, according to law, the evidence was admissible. The other point was this: It was said by Mr. Karstake that, independently of any custom, it was a question for the jury whether the bargain between Lamont and the defendants did not extend to the Glasgow as much as to the New York. I think there was evidence to that effect which ought to have been submitted to the jury. In my opinion, therefore, on both points the plaintiffs are entitled to have the rule made absolute." MARTIN, B.: "I am of the same opinion. The facts of the case are these: The bankrupt Lamont, who formerly carried on business as a ship-broker at Liverpool, was examined on behalf of the plaintiffs, his assignees, and his evidence was that in November, 1854, he came to London and had an interview with Duncan, one of the partners in the defendants' house, and he then communicated to Duncan that he knew of two vessels, the New York and the Glasgow, which might be chartered by the French government (for whom the defendants were authorized to act by Messrs. Pastrie, the agents of that government), and that Duncan agreed that he should share the commission with the defendants with respect to those two vessels. That was what Lamont proposed; and he persevered in stating that he was to have one-half of the commission. There was, therefore, his positive evidence to that effect, but there was also a variety of letters and communications between him and the defendants and the Glasgow and New York Steamship Company, which were to a degree inconsistent with it; and I should not have been surprised if the cause had gone to the jury; nor shall I be surprised, should the case be again tried, if the jury find they do not believe parts

## Miscellaneous Usages.

of Lamont's evidence, and rather give credit to his writings. However, the question whether the evidence of Lamont was true or false is for the jury, not for the court. With respect to the New York, his claim was this: that he was a party to the employment of the defendants in the sense I have stated, and he swore to an express agreement to divide the commission with them. I entertain no doubt that an 'introducing broker' is entitled to receive, and does receive, from the 'working broker' a portion of his commission. That is a common practice in London and other places where ships are chartered. As regards the New York, the plaintiffs admit that Lamont has received all he is entitled to in respect of the first charter, and they proposed to prove a custom that on a charter of this kind being renewed, the 'introducing broker' was entitled to receive a portion of the commission payable on the subsequent charter. Whether the evidence would have established the custom, or whether the custom, when proved, would have entitled the plaintiffs to recover, I do not know; but it seems to me they were entitled to give evidence of what the custom was, and that it was not competent to the judge to reject it. With respect to the Glasgow, the claim depends on a different principle. The first communication between Duncan and Lamont took place on the 7th of November, 1854, and on the 10th a written agreement was entered into. A letter was written, stating the precise terms of the agreement between Lamont and the defendants with respect to the New York, but there was no writing with respect to the Glasgow. Now, I agree that if two persons negotiating a contract consent to reduce it to writing, that writing is conclusively the contract. But, for the purpose of bringing that rule to bear, it must be established that the parties meant to reduce the entire contract to writing; and if it be established that only a portion of it is reduced to writing, there is nothing in law to prevent evidence being given to show what the real bargain was. I am clearly of opinion that the letter of the 10th of November, 1854, does not refer to the Glasgow (assuming the parol evidence given by Lamont to be true), and that it was intended to refer to the New York only; consequently, putting aside the custom altogether, the plaintiffs have a right to have it submitted to the jury whether they are entitled to recover in respect of the first charter of the Glasgow. That having been withdrawn from them, in my opinion there ought to be a new trial. I am of this opinion simply upon the facts of the case. There are letters in which a vast deal is inconsistent with Lamont's statement. The jury are the proper tribunal to try that, and in my opinion it was not competent for the judge to withdraw it from them."

POLLOCK, C. B.: "I agree with my brother BRAMWELL that a custom such as this, which controls the written contract of the parties and makes them agree to something which they have not expressed, ought to be carefully watched, and restrained within reasonable limits. And I own I think that where one broker introduces a vessel to another, a custom to share the commission so long as the vessel shall be chartered by the same party, or indeed by any other party, through the same broker, is of extremely doubtful legality. But I am not influenced in my decision by that consideration. A custom may, by evidence, be attached to any ordinary course of business so as to introduce a term not inconsistent with that course of business; and undoubtedly where one broker introduces a vessel to another, a custom may be shown that the broker so introducing it is entitled to a share of the commission on that particular charter; but I think

## Suretyship—Attorney and Client.

such a custom cannot be extended to a special agreement between the parties, entirely independent of the usual course of business. If the relation of the parties is settled by an agreement not corresponding with the usual course of business, I think the custom ought not to be received in evidence. The case, as before me, certainly presented that aspect. The agreement with respect to the commission was entirely out of the ordinary course of business, but by their special agreement. For that reason I rejected the evidence that was offered, not as evidence of a custom controlling every agreement, but as evidence of what the custom was in the ordinary course of business. It is clear that this agreement was not in the ordinary course of business, and therefore the custom does not apply. Of course, I express this opinion with some doubt, after hearing that my brothers MARTIN and BRAMWELL are of a different opinion, but I still think that what I did at *Nisi Prius* was correct."

§ 192. Other Cases—Suretyship—Attorney and Client.—And, in individual cases, evidence has been admitted to expound the words "currency,"<sup>1</sup> "Canada money,"<sup>2</sup> "Texas money,"<sup>3</sup> "Kentucky currency,"<sup>4</sup> "Ills. cy.,"<sup>5</sup> as used in negotiable instruments; and the terms "bond,"<sup>6</sup> "borrowed money,"<sup>7</sup> "Lanier House,"<sup>8</sup> and "expected,"<sup>9</sup> as used in other contracts.

In *Fox v. Parker*,<sup>10</sup> the defendants had entered into a contract by which they agreed to be liable to the extent of \$1,000 that one E. M. Parker should account to the plaintiff for the proceeds of paper sent him by the plaintiff to be sold on commission. Plaintiff brought an action for \$900, which he alleged to be due from E. M. Parker to him on account of paper sold. The defendants sought to be relieved from liability on the ground that, from time to time, notes of E. M. Parker had been taken by the plaintiff on account of the business, and they claimed that in this way time had been extended to their principal, and that they were discharged. Evidence of a usage among those engaged in the business of selling paper on commission to give notes to the manufacturer before the paper is sold, so as to enable him to raise money thereon in anticipation of the sales, was held admissible, on the ground that such evidence did not contradict the terms of the written contract, but simply went to explain and ascertain the intention of the parties in relation to a matter upon which the contract was silent. So, it has been held that usage may prevent a surety from taking advantage of acts which would otherwise discharge him. "The long-continued usage of the bank," said SHERLEY, C. J., in *Crosby v. Wyatt*,<sup>11</sup> "well known to both the sureties, would seem to be as satisfactory evidence of an assent on their part to an agreement for delay as the payment of interest in advance would be of such an agreement."

In *Bodfish v. Fox*,<sup>12</sup> the defendants, a firm of attorneys, being sued for money in their hands received in satisfaction of a judgment rendered for the plaintiff,

<sup>1</sup> *Palmer v. State Bank*, 16 Iowa, 321; *Farwell v. Fay*, 7 Mo. 555; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Chambers v. George*, 1 Litt. 355.

<sup>2</sup> *Thompson v. Sloan*, 23 Wend. 71.

<sup>3</sup> *Roberts v. Short*, 1 Texas, 373.

<sup>4</sup> *Lampton v. Haggard*, 3 Mon. 149.

<sup>5</sup> *Hulbert v. Carver*, 37 Barb. 62. But see Illinois cases, *post*, Chap. V.

<sup>6</sup> *Stone v. Bradbury*, 14 Me. 185.

<sup>7</sup> *Murray v. Spencer*, 24 Md. 520.

<sup>8</sup> *Harris v. Dub*, 57 Ga. 77.

<sup>9</sup> *Bald v. Raynor*, 1 Me. & W. 348. And

see *Fawkes v. Lamb*, 31 L. J. (Q. B.) 88.

<sup>10</sup> 44 Barb. 511.

<sup>11</sup> 23 Me. 156.

<sup>12</sup> 23 Me. 90.

Usage to Explain Deeds.

claimed the right to retain the whole of the bills of cost, exclusive of witnesses' fees and money advanced by their client, the plaintiff, in addition to the regular charge for term-fees and arguing-fees, as belonging to them as attorneys in a suit, on a successful defence, by the common usage of the bar in Portland for many years. On the trial, they introduced evidence showing that the practice in that county had been for many years for the attorney to charge his client with a term-fee at each term, excepting the term at which the case was argued, when an arguing-fee was taxed instead thereof; and in addition thereto, when the defendant prevailed, to charge his client with the taxable costs, exclusive of witnesses' fees and money advanced by the client. The plaintiff, in order to show that the defendants had agreed with him as to the amount of their charges, read a letter from them, in which was said: "Yours of the 5th inst. we have this day received. In answer, have to say that the U. S. C. C. does sit here on the 1st day of May next. We send, as is requested, our bill against you, and if the cause is tried, our charge for arguing-fee and services at the May term will probably be about \$30." With this letter was sent a bill of the regular charges at each prior term, and of some small payments. It was held that the usage was not in conflict with any contract. Said SHEPLEY, J.: "It is further contended that it should not have been received, because there was proof in the letter of the defendants of a special contract to perform the services for an agreed compensation. The usage does not appear to be, as the argument supposes, in conflict with the contents of the letter. Nor does the letter show that there was a compensation agreed upon between the parties. It was written while the suit was pending, and states the charges which would be claimed for the services performed. The usage does not present any other or different claim as then existing. It presents one as first arising upon a determination of the suit favorably for the defendant."

§ 193. *Bailment or Sale.*—So, a contract which on its face is a bailment may be shown to be a sale. Thus, in *Dawson v. Kittle*,<sup>1</sup> a memorandum acknowledged the receipt of a quantity of grain "on freight." These words, in law, imported a bailment; but NELSON, C. J., admitted the evidence of dealers in grain to show that, according to the custom among them, they meant an absolute sale. Similar evidence was admitted in *Goodyear v. Ogden*,<sup>2</sup> to explain the meaning of the words "in store" in the same way. Where, on an action for goods sold and delivered, a paper in the following words, signed by the defendant, was introduced as the contract: "Received of S. 50 barrels of provisions for account of D.," it was held that parol evidence was admissible to show that the paper did not mean a sale, or that the provisions were received on an account due D., but that they were received in accordance with the defendant's course of business to sell on commission.<sup>3</sup>

§ 194. *When admissible to explain Deeds.*—Usage is admissible to explain the language of a deed,<sup>4</sup> when ambiguous or equivocal—as, for example, to

<sup>1</sup> 4 Hill, 107.

<sup>2</sup> *McKinstry v. Pearsall*, 3 Johns. 319.

<sup>3</sup> 4 Hill, 104. And see *Irwin v. Clark*, 13 Mich. 10; *Chase v. Washburn*, 1 Ohio St. 252; *Carlisle v. Wallace*, 12 Ind. 252; *Hughes v. Stanley*, 45 Iowa, 622.

<sup>4</sup> *Cortelyou v. Van Brundt*, 2 Johns. 357; *United States v. Pechman*, 7 Pet. 51; *Mitchell v. United States*, 9 Pet. 711.



## Words and Phrases in Deeds.

construe the words "gravel,"<sup>1</sup> or "waste lands,"<sup>2</sup> or "zinc," or "premises,"<sup>3</sup> or "colliery,"<sup>4</sup> to show what is understood as passing by the conveyance of a "saw-mill,"<sup>5</sup> or by a license to cut "timber for building."<sup>6</sup> In the case of a deed of a burial-lot, it may be shown that it is customary for the proprietors of cemeteries to have the exclusive control of the avenues and alleys therein;<sup>7</sup> and where a deed gave the "privilege of deepening the ditch," evidence of the usual mode of deepening ditches was admitted to explain the words.<sup>8</sup> A call in an instrument for "Clough Overton's survey" may be shown to have been intended for the survey of another person, but that at the time it was usually known as "Clough Overton's survey."<sup>9</sup> Where a deed described the boundaries between two mining-claims as "running thence north twenty-three degrees and fifteen minutes, west six hundred and forty-three feet to a pine stake, and thence north forty-five degrees west to Devil's Cañon," parol evidence was admitted to show that it was the custom of the locality to run boundary lines by the magnetic meridian.<sup>10</sup> So, the form of deeds is a matter of usage.<sup>11</sup> A purchaser under a land contract that does not specify what sort of deed he is entitled to, may demand a deed with the customary covenants.<sup>12</sup> And usage may prove a dedication.<sup>13</sup> In an action of ejectment in Missouri it appeared that a patent issued to A. had been from an early day in the possession of W. To explain this fact and support a title claimed under W., evidence was offered, and rejected, to show that it was the custom in early times in that State to assign duplicate certificates of land entries by a writing on the back of the certificate, and that such assignments were usually recognized as sufficient conveyances. "We cannot perceive," said the Supreme Court, "upon what principle this evidence could have been received. Under the law of Congress, an assignment of the certificate of entry would have authorized the issuance of the patent in the name of the assignee, and if defendant intended to rely upon such assignment, the evidence offered was not competent to establish it. Nor was it admissible for the purpose of explaining W.'s possession of the patent, which could avail nothing to those claiming under W. unless it was also shown that he became the possessor of it by virtue of an assignment of the certificate, or in some other way recognized by law as sufficient to pass a right to it."<sup>14</sup>

In a case before Lord ELLENBOROUGH, in 1817, a *scire facias* had been brought to repeal a patent obtained by the defendant for the manufacture of hair-

<sup>1</sup> *Brown v. Brown*, 8 Mete. 573.

<sup>2</sup> *Prather v. Ross*, 17 Ind. 495.

<sup>3</sup> *New Jersey Zinc Co. v. Boston Franklin Co.*, 15 N. J. Eq. 418.

<sup>4</sup> *Carey v. Bright*, 58 Pa. St. 70.

<sup>5</sup> *Farrar v. Stackpole*, 6 Me. 154.

<sup>6</sup> *Livingston v. Ten Broeck*, 16 Johns. 14; 8 Am. Dec. 287. And see, generally, *Cambridge v. Lexington*, 17 Pick. 230; *Springston v. Sampson*, 32 N. Y. 706; *Parsons v. Miller*, 15 Wend. 562; *French v. Carhart*, 1 N. Y. 102.

<sup>7</sup> *Seymour v. Page*, 33 Conn. 66.

<sup>8</sup> *Collins v. Driscoll*, 34 Conn. 43.

<sup>9</sup> *Seay v. Walton*, 5 T. B. Mon. 369.

<sup>10</sup> "It was not to contradict or vary the meaning of the term *north* that the evidence

was admitted, but to ascertain the sense in which it was used by the parties. The term has two meanings, one common and the other technical. Unprofessional men generally mean, in stating courses, the lines indicated by the compass, without making any allowance for variation in the needle, and even professional surveyors, as appears from the evidence in this case, would not consider the true meridian as intended, unless specially so informed." *Field, J.*, in *Jenny Lind Co. v. Bower*, 11 Cal. 194.

<sup>11</sup> *Kirkendall v. Mitchell*, 3 McLean, 144.

<sup>12</sup> *Gault v. Van Zile*, 37 Mich. 22.

<sup>13</sup> *Sevey's Case*, 6 Me. 118.

<sup>14</sup> *Avery v. Adams*, 69 Mo. 603.



## Illustrations.

brushes, which were described as "tapering brushes." The specifications showed that the mode of manufacturing the patent brushes differed from others, in that the bristles were taken, of the length of an inch and a quarter, and, before their insertion in the wood, were mixed up together and then drawn through the holes and secured by a brass wire, the bristles being then of unequal length. The common mode in use required the bristles to be inserted in the stock, as near the same length as possible, they being afterwards cut down so as to be of the same length. Lord ELLENBOROUGH: "Tapering means, gradually converging to a point. According to the specification, the bristles would be of unequal length, but there would be no tapering to a point, which the description assumes." Counsel for the defendant then stated that by compressing the bristles in each tuft of hairs the effect would be to make them converge to a point; and he suggested that the brushes were known by this description in the trade. Lord ELLENBOROUGH: "If the word 'tapering' be used in its general sense, the description is defective; there is no converging to a point. *If the term has had a different meaning annexed to it by the usage of the trade, it may be received in its perverted sense.* At present, however, I cannot hold out any prospect that the difficulty arising from the grammatical consideration can be removed." The evidence afterwards introduced did not remove the objection, and Lord ELLENBOROUGH advised the jury to find that it was not a "tapering" brush, which they did.<sup>1</sup>

§ 195. **Sporting Usages.**—*Evans v. Pratt*<sup>2</sup> declared the admissibility of a sporting usage. The plaintiff and defendant had signed the following agreement:—

"PRATT AND EVANS.

"Thomas Holyoake, Esquire, Umpire.

"Frederick Pratt bets Thomas Evans £100 to £25, P. P. (play or pay), Mr. Ryley's brown mare (late his property) beats Thomas Evans' mare Matilda, four miles across a country, thirteen stone each. To come off 1st March, 1841. The umpire's decision to be final.

"THOMAS EVANS,  
"FREDERICK PRATT."

The race duly came off on the day appointed, and Mr. Ryley's brown mare came in first, and Mr. Evans' Matilda last. But the umpire decided that the plaintiff's mare was the winner, as the first horse had passed through a gate-way instead of going over the hedge, as the rules of steeple-chasing required. Mr. Pratt, being dissatisfied with this decision, refused to pay, and Mr. Evans thereupon brought suit for the £100, when it was ruled that evidence that, according to the usage of sporting men, "across a country" meant that the riders were to go over all obstructions, and were not at liberty to avail themselves of an open gate, was admissible. "The contract declared upon, and proved by the memorandum produced, was that the horses were to run 'four miles across a country.' This is an expression of which we cannot take judicial notice. The meaning of that expression was a question for the jury, to be decided by them upon the evidence before them. The evidence showed that by this expression the rider

<sup>1</sup> Rex v. Metcalf, 2 Stark. N. P. 249.

<sup>2</sup> 3 Man. & G. 759; 4 Scott N. R. 378.

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Mines and Mining.

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is excluded from riding through an open gate." So, in an early Pennsylvania case, in a suit on a written wager, evidence was admitted that, by the custom of sportsmen, when either party relinquishes the deposit the bet is at an end.<sup>1</sup>

§ 196. **Mines and Mining.** — In *Clayton v. Gregson*,<sup>2</sup> the custom of miners was admitted to explain the meaning of a word in a lease of a coal-mine. The lessees of a coal-mine had covenanted with the lessors that they would by a certain time get all the demised coal in a certain township, "not deeper than, or below the level of" the bottom of a mine under a certain point, at the surface. In an action for the breach of the covenant, a question arose as to what portion of the coal the lessee was bound to get, as lying "not deeper than, or below the level of" the mine. The plaintiff contended that the word "level" must be understood in its ordinary sense, but the defendant maintained that in the lease in question the word "level," according to the custom and understanding of miners, had reference to the drainage, and that every part of the mine which would require to be drained from a point lower than the bottom of the mine under A. was below the "level" of the bottom there, though it might be above the horizontal plane passing through such part of the bottom, and offered evidence to prove this understanding. ALDERSON, J., who presided at the trial, rejected the evidence, but his ruling was reversed in the King's Bench. Lord DENMAN, C. J., said: "We are all of the opinion that the evidence was receivable. The learned judge who tried the cause does not appear to have had a strong opinion on the subject, but only to have put the question in the most convenient course for ultimate decision. The word 'level' is not in itself a technical word, but it is used in a particular business in such a manner that it may, consistently with its general meaning, have a particular meaning also. It is a term which, in its general use, may have more than one meaning, and as it is employed here it clearly has a technical sense, and may properly be explained by evidence." LITLEDALE, J.: "I am of the same opinion. The word is like many others in the English language, which may have several meanings." PATTESON, J.: "The word 'level' must be taken *secundum subjectam materiam*. Here it is a term used in mining, and, as such a term, requires explanation."<sup>3</sup>

§ 197. **Contracts for Labor and Materials.** — Contracts for labor to be performed and materials to be furnished have given rise to disputes which only

<sup>1</sup> *Morgan v. Richards*, 1 Browne, 173.

<sup>2</sup> 5 Ad. & E. 302.

<sup>3</sup> As to customs of mining and mines, see *Colman v. Clements*, 23 Cal. 245; *Roach v. Grow*, 16 Cal. 323; *English v. Johnson*, 17 Cal. 107; *Gore v. McBrayer*, 18 Cal. 522; *Waring v. Grow*, 11 Cal. 366; *Martin v. Solomons, etc., Mining Co.*, 26 Cal. 527; *Hicks v. Bell*, 3 Cal. 219; *Prosser v. Parks*, 18 Cal. 47; *Packer v. Heaton*, 9 Cal. 598; *St. John v. Kidd*, 26 Cal. 203; *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 327. A California statute provides: "In actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings

embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decision of the action." Code Proc. Cal., § 621. And see *Bradley v. Lee*, 38 Cal. 302; *Correa v. Frietas*, 42 Cal. 341; *Harvey v. Ryan*, 42 Cal. 627; *Strong v. Ryan*, 46 Cal. 33; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534; *Sullivan v. Hense*, 2 Cal. 424. As to customs under the Mexican law, see *Van Schmidt v. Huntington*, 1 Cal. 55. And see, further, *Golden Fleece Co. v. Cable Co.*, 2 Nev. 312; *Oramuno v. Uncle Sam, etc., Co.*, 1 Nev. 215; *Mallett v. Uncle Sam, etc., Co.*, 1 Nev. 193; *Kinney v. Consolidated, etc., Mining Co.*, 4 Sawyer, 302.

## Miscellaneous Usages.

evidence of usage could settle. In *Jordan v. Meredith*,<sup>1</sup> decided by the Supreme Court of Pennsylvania in 1801, the action was for money due for plastering two houses, and the dispute was as to the mode of measuring, the plaintiffs insisting that according to the usage of plasterers in Philadelphia they were entitled to the rate per square yard contracted for, not only for the surface actually plastered, but for one-half of the size of the windows. But the court said: "The pretended usage of the plasterers in the present instance is unreasonable, and bad in itself. To charge an employer with materials never received, is the height of injustice." It is not easy, however, to reconcile this case with subsequent ones in which similar questions have been presented. In *Pittsburg v. O'Neill*,<sup>2</sup> decided by the same court forty-four years later, it was ruled that the number of bricks laid in a pavement, under a contract, might be computed by allowing a given number to the square yard, according to the usage of pavers. In *Ford v. Tirrell*<sup>3</sup> (Massachusetts, 1857), the contract was to build the wall of an octangular cellar at the rate of eleven cents per foot, and the dispute was as to the mode of measurement, — the defendant contending that the inner surface of the wall should be the rule; the plaintiff, that an additional allowance should be made for the necessary work at the angles to support the building, — and it was held that it was competent to prove a local usage of measuring cellar walls, in order to interpret the contract. In *Lowe v. Lehman*<sup>4</sup> (Ohio, 1864), on a contract to furnish and lay up brick at a certain price per thousand, the controversy was as to the proper mode of counting the bricks, and evidence of a usage among builders to estimate by measurement of the walls on a uniform rule based on the average size of brick, making slight additions for extra work and wastage, deducting openings in walls, but not for openings in chimneys, nor gambrels, was ruled to be admissible. In answer to the suggestion that the custom was unreasonable, the court said: "We are unable to see anything unreasonable in the custom. The workman was to furnish the brick and materials, and lay them up by the thousand. The contract contains no specifications of the dimensions, shape, angles, openings, or arches of the wall, or of the size of the brick. It does not require a mason to know that the value of the work and materials depends much upon these, and such like conditions, if they are to be paid for by the numerical thousand. Again: the brick are to be furnished as well as laid up. Where and how will you count them numerically? Will you count them at the kiln, on the ground, or in the wall? And who will lose the breakage in transportation and in handling, and the waste of filling them into the wall. Some fair measurement of the wall would seem to be a more reasonable method. And we cannot say that this method was not a fair one. It slightly increased the estimated number of bricks in the wall, it is true, by making small additions for extra work, and extra waste of bricks at the angles and openings; and the rule of measurement adopted fixes upon an arbitrary and uniform dimension for the average size of the brick, which may vary slightly, but cannot vary very much from their true average size. All this seems to be reasonable." The foregoing cases were reviewed and the question of the reasonableness of such usages was considered in a lengthy and exhaustive manner by the Court of Appeals of New

<sup>1</sup> 3 Yeates, 318.<sup>2</sup> 1 Pa. St. 343.<sup>3</sup> 9 Gray, 401.<sup>4</sup> 15 Ohio St. 179.

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See *Bradley v.  
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627; *Shoong v.  
Water Co.*, 2  
Cal. 2d 285; *Hense v.  
the Mexican  
Mining Co.*, 1 Cal. 55;  
*Co. v. Cable*,  
1 Cal. 2d 285;  
*Co. v. Uncle Sam*,  
1 Cal. 2d 285;  
*Consolidated*,

## Contracts for Labor and Materials.

York in 1872, in the case of *Walls v. Bailey*.<sup>1</sup> The plaintiffs contracted, in writing, to furnish the materials to do certain plastering for defendant, at so much per square foot. They charged him for the full surface of the wall, without deducting for cornices, base-boards, or doors and windows. On the trial, proof that this was the customary method among plasterers in measuring work was allowed. The Court of Appeals sustained the ruling of the lower court in this particular. Said FOLGER, J.: "The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering-work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows and doors?" After examining the prior adjudication, the learned judge continued: "So, in the case before us, how shall the number of the square yards of work done be ascertained? is not so determinately reached by the language of the contract as that the law can say there was but one method in the minds of the parties, and this is it." Referring next to the case of *Jordan v. Meredith*, the judge concluded his opinion by showing that such a usage was not necessarily unreasonable, and could not, therefore, be rejected on that ground: "The appellant has cited us to *Jordan v. Meredith*,<sup>2</sup> in which it is said that the pretended usage of plasterers to charge for a part of the openings is unreasonable and bad. The reason there given why it is so, is that it is the height of injustice to charge an employer with materials never furnished. But as to this case, it is to be remarked that this expression is *obiter*. For it did not appear that the jury found that there existed the usage commented upon; and the decision of the case is put upon the ground that there was no proof that the jury had been governed by a usage. Again: the remark is confined to a consideration of the material furnished, whereas the usage claimed in the case before us is concerned as well with labor performed. And the usage is not designed to obtain payment for material never furnished. It is a method devised for more conveniently and readily ascertaining the *quantum* of compensation for what work has been done in fact, and what material has been in fact furnished. It is agreeable with common sense that it is more difficult, asking more skill and care, requiring more time to plaster about the frames of doors and windows and along the edges of base-boards and cornices than over the plain, uninterrupted surface of wall and ceiling. The more, then, of such openings or obstacles, the more, in proportion to the space of plaster actually laid on, should be the compensation. And it matters not, in law or in reason, how the amount of that greater compensation is arrived at; whether by a minute and precise calculation of part plain and of part broken space, at a greater price for the square yard of space actually covered, or by an assumption that the whole surface worked upon is plain, and then payment be made for it at a less price per square yard thereof. The aim which the usage takes is at a compensation which shall be just to employer and employed. The mode of reaching it proposed by the usage does not infringe upon any principle of law, for it is but a mode. It is

<sup>1</sup> 49 N. Y. 464.<sup>2</sup> 3 Yeates, 318.

## Miscellaneous Usages.

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not unreasonable; for the price per square yard will, in the rivalry or competi-  
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 taining the number of yards, and the difference in the amount of material  
 furnished will be but a make-weight in determining the compensation for the  
 labor performed."

Where, by a building-contract, the plaintiff agreed to make certain alterations  
 and repairs upon the defendant's house, for which the latter agreed to pay  
 twelve shillings "per day" for each man employed, it was held competent to  
 show a usage among carpenters that ten hours constituted a "day's" work, and  
 entitling them to charge one day and a quarter for each natural day during  
 which the men worked twelve hours and a half. "Here," said *Bronson, J.*,  
 "the plaintiff was to be paid for his workmen at the rate of twelve shillings *per*  
*day*, but the parties have not told us by their contract what they meant by a  
 day's work. It has not been pretended that it necessarily means the labor of  
 twenty-four hours. How much, then, does it mean? Evidence of the usage or  
 custom was let in to answer that question. And when we find a universal  
 usage in this business to call ten hours' labor a day's work, we have arrived at  
 the true meaning of the word 'day' as used in this contract."<sup>1</sup> So, where *A.*  
 and *B.* entered into a contract by which *A.* was to cut and fit the stone for walls  
 of a tunnel at a specified price per foot, "the face of the work that shows to be  
 measured, and none else," and *A.* claimed that "the face of the work" included  
 all the cut and dressed surface exposed, both horizontal and perpendicular,  
 while *B.* insisted on an opposite meaning, the difference was settled by evidence  
 of usage.<sup>2</sup> An agreement for the building of a house contained a proviso that  
 "no alterations or additions should be admitted unless directed by the architect  
 of the defendant, in writing, under his hand, and a weekly account of the work  
 done thereunder should be delivered to the architect on every Monday next  
 ensuing the performance of such work." In an action to recover a balance due  
 the plaintiff on this contract, parol evidence was admitted to show that by  
 the usage of the building trade "weekly accounts" meant accounts of the  
 day-work expended in each week on additions and alterations, and that such  
 accounts were not usually given in the case of extra work capable of being  
 measured.<sup>3</sup> And where the plaintiffs contracted in writing to build for the  
 defendant the front and back walls of a house "for the sum of 3s per super-  
 ficial yard of work, nine inches thick, and finding all materials, deducting for  
 lights," and it appeared that the lower part of the walls to the height of eleven  
 feet was of stone, two feet thick, the remainder of brick, fourteen inches thick,  
 evidence was admitted of the usage of builders at the place to reduce brick-  
 work, for the purpose of measurement, to nine inches, but not to reduce stone-  
 work unless exceeding two feet in thickness.<sup>4</sup> Where a contract for the erection  
 of a building specifies the dimensions of the walls, floors, etc., but says nothing  
 about the roof, it may be shown by evidence of the custom of the trade that  
 such a contract did not call for a tin roof, or, indeed, any roof.<sup>5</sup> And on a simi-  
 lar principle, and for the same reasons, evidence of usage has been received to  
 prove the meaning of "hard-pan" in a contract to make excavations,<sup>6</sup> and to

<sup>1</sup> *Horton v. Locke*, 5 Hill, 437.

<sup>2</sup> *Martin v. Thrasher*, 40 Vt. 460.

<sup>3</sup> *Myers v. Sarl*, 30 L. J. (Q. B.) 9; 7 Jur. (N. S.) 97.

<sup>4</sup> *Symonds v. Lloyd*, 6 C. B. (N. S.) 691.

<sup>5</sup> *Reynolds v. Jourdan*, 6 Cal. 108.

<sup>6</sup> *Dickson v. Water Commissioners*, 2 Hun, 615; *Dubois v. Delaware, etc., R. Co.*, 12

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 Master and Servant—Contracts of Service.
 

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explain the terms "business card," "advertising chart," and the word "published," in an agreement to pay another a certain sum "for inserting business card in two hundred copies of his advertising chart, to be paid when the chart is published."<sup>1</sup>

§ 198. **Master and Servant—Contracts of Service.**—We have seen that contracts of service may be explained by usage;<sup>2</sup> and this is so, as well, where the contract has been reduced to writing. Thus, in *Queen v. Inhabitants of Stoke-upon-Trent*,<sup>3</sup> workmen were hired for a year under a contract whereby they engaged "to serve B. & Co. from 11th November, 1816, to 11th November, 1817, \* \* \* to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants." It appearing that one of them had occasionally absented himself on holidays during the year without his master's permission, it was ruled in the Court of Queen's Bench, reversing the opinion of the trial court, that evidence was admissible to show that it was the custom of that trade for the workmen to take certain holidays, and to absent themselves on such occasions without their master's permission. Again: in *Grant v. Maddox*,<sup>4</sup> the plaintiff was an actress and the defendant a theatrical manager, and by a written contract she agreed to perform at his theatre, and the defendant agreed to engage her for "three years," and pay her a salary of £5, £6, and £7 "per week" in those years, respectively. In an action on the contract, the plaintiff contended that she was entitled to receive the salary stipulated for every week of the whole of the three years, but the defendant tendered evidence, which was admitted, to show that according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more "years," actors were never paid during the time of vacation, but only during what was called the theatrical season. Where the defendant covenanted to teach the plaintiff the trade of "a cabinet and mahogany door maker," evidence that these words, as used in the trade, included only the making of doors of mahogany and ornamental woods was admitted. "Where terms of art are used," said MITCHELL, J., "and have acquired a definite meaning known to those engaged in it, but not plain on the face of the agreement, evidence may be received as to what that meaning is. Thus, no one not familiar with the trade could tell all that a lad should be taught who was to learn the trade of a cabinet-maker; nor would one know from the words alone that a mahogany door maker was one who made the frame of the door from pine wood, and only laid on veneers of mahogany."

In *Parker v. Ibbetson*,<sup>5</sup> the defendants were manufacturers of woollen cloths, and the plaintiff agreed to serve them as agent, under a written agreement as follows: "P. engages to serve the said I. & Co. as agent or representative, at the salary of £150 per annum in consideration thereof. Also provided, that at the end of the year, if I. & Co. find the said P. has done sufficient business to justify them in recompensing him by making up his salary to £180, to do so, being a

Wend. 331; s. c. 15 Wend. 87; *Currier v. Boston, etc., R. Co.*, 34 N. H. 493.

<sup>1</sup> *Stoops v. Smith*, 100 Mass. 63. Compare *Hotson v. Browne*, 9 C. B. (N. S.) 442; *Zerrahn v. Ditson*, 117 Mass. 553.

<sup>2</sup> *Ante*, pp. 134-136.

<sup>3</sup> 5 Q. B. 303.

<sup>4</sup> 15 Mee. & W. 737.

<sup>5</sup> 4 C. B. (N. S.) 316.



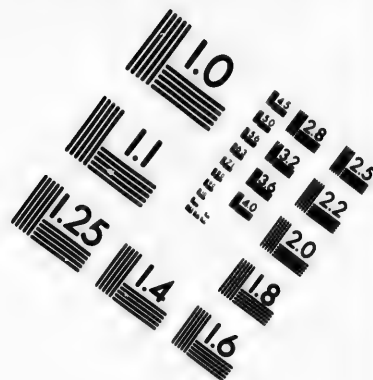
## Explaining Contracts of Service.

donation of £30 to his present stipulated amount of £150." This agreement was entered into on the 30th of January, and the plaintiff continued in the service until the 1st of August, receiving his salary monthly, when the defendants gave him a month's notice to quit. For this dismissal, which the plaintiff contended was wrongful and in contravention of the agreement, he brought an action. On the trial, the defendants called several witnesses to prove a custom in the trade to dismiss at a month's notice though the engagement was at a yearly salary, and it was proved that one house of prominence in the trade adopted a form of hiring to exclude the custom for a month's notice, where the agreement stipulated for a bonus for good conduct at the end of the year. The judge (CRESWELL) instructed the jury that if they found that the custom existed, and that the contract was made with reference to it, they should find for the defendants; otherwise, for the plaintiff.<sup>1</sup> The jury found that the custom was proved, but that

<sup>1</sup> Creswell, J., in summing up, said to the jury: "The plaintiff in this case complains that he has been dismissed by the defendant on a month's notice, notwithstanding he was engaged under a contract for a year. The defendant, on the other hand, says: 'It is true, I entered into a contract with you for a year; but by the custom and usage of the place where the contract was made and was to be fulfilled,—viz., London,—a clerk or servant, though hired under such circumstances, is liable to be discharged, and entitled to put an end to the service at a month's notice.' No doubt, with reference to domestic servants the custom is universally so. A servant is hired at yearly wages; the hiring is yearly, but is liable to be terminated by either party on a month's notice. It does not, however, follow from that that the same state of things exists with regard to clerks and persons in the position of the present plaintiff. The circumstance of the contract being in writing makes no difference; it is not any stronger or more binding by being written, though it renders the proof of its terms more easy, and less liable to misrepresentation or mistake. If that which is here put upon paper had simply been expressed by word of mouth, its legal operation and effect would have been precisely the same. In order to justify his dismissal of the plaintiff within the year, the defendant, by his fifth plea, sets up the custom of a month's notice; and if he proves that to your satisfaction, whether the contract be in writing or not makes no difference. Now, the defendant has called before you several witnesses to prove the custom as alleged. It was not necessary, perhaps hardly possible, to adduce an instance exactly in point of a person in the precise position of the present plaintiff; but you must judge from

the general understanding of the trade in analogous cases whether the parties meant to contract upon the footing of that custom. Where there is a general custom prevailing with reference to a particular trade in the place where a contract is made, and nothing is said to exclude it, the contract must be assumed to have been made subject to the importation of the custom into it. For instance, in a particular trade, a contract for the sale of goods, nothing being said to the contrary, is understood to be at a credit of a fortnight or a month. In that case the parties are supposed to contract with reference to the custom, and are bound by it. One of the defendant's witnesses states that it is the custom of the trade generally to put an end to the service at a month's notice, where the hiring is yearly and at a yearly salary. Generally speaking, a yearly salary imports a yearly hiring, as in the case of a butler or a coachman; and in the cases under the old settlement law, a general hiring at a yearly salary was always held to be a hiring for a year. The principal witness on the part of the defendant, however, on cross-examination, stated that he did not remember an instance of a clerk or agent in this particular trade having been dismissed at a month's notice where the contract contained such a provision as in this case—for a bonus for good conduct at the end of the year. That, as it seems to me, may have some influence in determining your judgment upon this question. The parties first agree for a general hiring at a yearly salary; then they add a proviso that if the employer shall, at the end of the year, consider the agent deserving of it, he shall be rewarded with a donation of £30. Now, the only legitimate effect of that—assuming the custom to have been established—would seem to





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## Master and Servant — Contracts of Service.

the hiring was a special hiring, to which the custom did not apply, and returned a verdict of £70 for the plaintiff. On appeal, all the judges held that the construction of the contract should not have been left to the jury. *Crowther, J.*, said: "I am of opinion that this rule must be made absolute. The question arises in an action brought upon an agreement entered into between a clerk or servant and his employer in a certain trade, which agreement is in writing; and the contention at the trial was as to the existence of the custom stated in the fifth plea, and its application to the contract before the court. The jury were asked certain questions, and invited to draw certain conclusions. These were, whether the custom was proved, and whether, if proved, it was applicable to the special terms of this contract. On the part of the defendant it is contended that this latter was not a question for the jury, but for the court; and I am of that opinion. Looking at the evidence, it seems to have been established that there was a general custom in the trade that a yearly hiring might be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff that, assuming such a custom to exist, the special terms of this agreement exclude the application of it to this case. It seems to me that there is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendant as agent, at the salary of £150 per annum; then follows a proviso that if 'at the end of the year the said Henry Ibbetson & Co. (the defendants) find the said R. A. Parker (the plaintiff) has done sufficient business to justify them in recompensing by making up his salary to £180, to do so, being a donation of £30 to his present stipulated amount of £150.' Reading this agreement, — and its construction is for the court, and not for the jury, — it seems to me to be simply an agreement for a yearly hiring at a yearly salary, and that there is nothing in the proviso to alter the nature and character of the agreement. It is a mere statement that the defendant will at the end of the year, if he shall see fit, make the plaintiff a present of £30. It is clear that this £30 could not have been recovered by action if the service had lasted until the end of the year. The simple question is whether, looking at the custom proved, which is general, there is anything in the written agreement to exclude it. I see nothing in it that can have that effect. The proviso cannot exclude it; that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom, it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule: that wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract unless by express terms excluded. There

be that by introducing that stipulation into the contract they meant the custom to be excluded. The first question, then, for your consideration will be whether such a custom as alleged exists in the particular trade; and the second question will be whether the contract was made with reference to the custom, or was a special contract to which the custom did not apply. If you think the evidence establishes the custom, it merely remains for you to consider whether you infer from the latter part of the agreement

that the parties meant to exclude the application of the custom in the particular case. If you think they did not contract with that intention, the defendant will be entitled to your verdict. If, on the other hand, you think the custom is not established, then the dismissal of the plaintiff before the expiration of the year is not justified, and he will be entitled to your verdict, with such damages as you may think him fairly entitled to for such wrongful determination of the contract."

## Explaining Duties of Employment.

was nothing to warrant the conclusion of the jury, and consequently the rule will be made absolute; not, however, to enter a verdict for the defendant, no leave having been reserved, but for a new trial." WILLES, J.: "I am of the same opinion. The fact of the plaintiff having been engaged at a yearly salary, under an agreement which has been reduced into writing, is clearly not enough to exclude the custom, which was proved to be general, to determine a yearly hiring by giving a month's notice, just as in the case of domestic servants, where, though a general hiring is presumed to be a hiring for a year, the service may nevertheless be put an end to at any time by a month's notice. The question is, whether the application of that general custom to the particular case is excluded by the concluding words of the agreement, which provide that at the end of the year, if the employer is satisfied with the amount of business done, he will make an addition of £30 to the stipulated salary. Would that proviso be inconsistent with the agreement going on to say that the master should be still at liberty, if so minded, to dismiss the servant at any time during the year, upon giving him a month's notice? Clearly not. The custom, being proved, becomes part and parcel of the contract. The jury had no right to take upon themselves to say that the special contract excluded the custom. The evidence upon which that conclusion was founded does not, in fact, negative the application of the custom to a hiring under a contract like this. The witness merely stated that he did not know of any instance where, under such an agreement as the present, the custom had been acted upon." BYLES, J.: "In cases of this nature two questions generally arise — the one, a question of law: whether the terms of the agreement may admit, or must necessarily exclude the custom; the other, one of fact: whether, if the agreement may admit the custom, the custom extends to the particular agreement. I do not, therefore, see that the learned judge was wrong in leaving this latter question to the jury. The evidence of the custom was irresistibly strong; and although the jury might, upon proper evidence, have found a limited custom, there was no evidence of any such limitation here."

§ 199. Same — To explain the Duties of an Employment under a written Contract. — Thus, a party agreeing to render service as "salesman," or in any other capacity, should be able to show by the usages of this trade what services he was to render, where his work was to be done, what goods he was to sell, and how many hours a day he was to be employed.<sup>1</sup> Thus, engaged as a "lace buyer," he might show that an order from his employer to fold some lace on cards was not within his contract, and that his refusal to do so would not justify his dismissal;<sup>2</sup> or, engaged as a travelling salesman, and agreeing not to go over "the same ground" for any other house, these words ought to be properly explained by parol evidence of usage;<sup>3</sup> and usage may explain what is included in "ship-carpenters' work," as these words are used in a contract.<sup>4</sup> Where a dancing-girl was engaged in France as a *danseuse* for a New Orleans theatre, it was held that she might justify her refusal to dance a parlor dance, in full

<sup>1</sup> Hagan v. Domestic Sewing-Machine Co., 9 Hun, 73. And see Sweet v. Lee, 3 Man. & G. 452; Price v. Mount, 11 C. B. (N. S.) 509; Hosley v. Black, 28 N. Y. 438.

<sup>2</sup> Price v. Mount, 11 C. B. (N. S.) 509.

<sup>3</sup> Mumford v. Gething, 7 C. B. (N. S.) 305.

<sup>4</sup> Collyer v. Collins, 17 Abb. Pr. 467.

## Usage to Explain Wills.

dress, in the comedy of "The Serious Family," by showing that such was not, by custom, required of *danseuses*.<sup>1</sup>

§ 200. **Usage admissible in Explanation of Wills.**—Evidence of usage is not infrequently of value in arriving at the intent of a testator, or the proper construction of a charitable gift. In the great case of *Shore v. Wilson*,<sup>2</sup> by deeds executed in the year 1704, Lady Hewley conveyed a number of estates of great value to trustees, upon trust, to pay out of the rents certain sums yearly, or otherwise, to "such poor and godly preachers for the time being of Christ's Holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's Holy Gospel," as the trustees for the time being should see fit. There were also other trusts of various kinds. Difficulty arising in the interpretation of the will, it was at last decided in the House of Lords, in 1842, that extrinsic evidence was admissible to show that at the date of the grant there was a sect which was in the habit of calling themselves by that name. In Connecticut, in 1845, a testator devised a portion of her estate to the "Foreign Mission Society." There was no society of that name, but, upon proof that it was customary for the testator, and many others, to speak of "The American Board of Commissioners for Foreign Missions" by the name used by him in the will, the existing society was allowed to take it.<sup>3</sup> And in a more recent case in New York, where a will contained a bequest to "The Home of the Friendless in New York," but there was no institution of that name, "The American Female Guardian Society" was decided to be the beneficiary intended, and entitled to the charity, it being shown that by the former name it was accustomed to be called by its officers, by its friends, and by the testator.<sup>4</sup>

So, where a testator is in the habit of using a particular term in a particular sense, this fact should be considered. As said by Lord ABINGER, in *Hiscocks v. Hiscocks*:<sup>5</sup> "The testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator, in these particulars, must be receivable as evidence to explain the meaning of the will." In *Beaumont v. Fell*,<sup>6</sup> a devise to "Catherine Earnley" was held to pass to "Gertrude Yardley," there being no such person as "Catherine Earnley" known to the testator, and, according to Lord ABINGER in *Hiscocks v. Hiscocks*, because the testator was accustomed to address Gertrude Yardley as "Gatty."<sup>7</sup> In a Connecticut case it was ruled that evidence that the testator, in speaking of the affairs of a society (a religious corporation), in contradistinction to the church in connection with which it was organized, always called it "the church," was admissible for the purpose of ascertaining which body should take

<sup>1</sup> *Baron v. Placide*, 7 La. An. 229.

<sup>2</sup> 9 Cl. & Fin. 355. And see *Attorney-General v. Drummond*, 1 Dr. & War. 353; 2 H. L. Cas. 837.

<sup>3</sup> *American Bible Society v. Wetmore*, 17 Conn. 186; *Howard v. American Peace Society*, 49 Me. 298; *Button v. American Tract Society*, 23 Vt. 349; *Doe v. Allen*, 12 Ad. & E. 451.

<sup>4</sup> *Lefevre v. Lefevre*, 2 N. Y. S. C. (T. & C.) 331; s. c. 59 N. Y. 434.

<sup>5</sup> 5 Mee. & W. 363.

<sup>6</sup> 2 P. Wms. 138; *Seablan v. Wright*, 13 Pick. 523.

<sup>7</sup> And see *Thomas v. Thomas*, 6 Term Rep. 606.

## Illustrations.

a bequest to "the church."<sup>1</sup> The rule upon which these cases are founded, and its reasons, are well stated by Surrogate BRADFORD in *Hart v. Marks*.<sup>2</sup> An annuity was given to "Paris Piccard," who was described in the will as "my cousin." The deceased had no cousin named "Paris Piccard," but proof was offered that his cousin "Priscilla Piccard" was usually named by him as described in the will. Said the court: "I think this evidence competent. Parol proof may always be used to apply the will; that is, to ascertain the person intended by the testator, by a description which, though not ambiguous on its face, cannot be applied precisely as expressed in the instrument. Strictly speaking, the testator had no cousin named Paris; and then the legacy must fall, unless we seek by extrinsic evidence to ascertain whom he intended by the description. We cannot, indeed, alter the plain terms of a written instrument by showing the testator's declarations in contradiction of the will, or in addition to it. The writing must prevail, and must be interpreted by its own language. But it is entirely competent to point out by proof the person who answers the description of a legatee, as contained in the will. There can be no doubt on that point. But if there be no person who exactly answers that description, then we are compelled to inquire, by means of extrinsic evidence, whom the testator intended. The court at all times may demand to be put in the place of the testator, in order to understand his will, its references, allusions, and descriptions. It is only by knowing the history of the parties, and looking at the surrounding facts, that we can at times clearly see what the testator designed. If, in describing any person in his will, he has used a name which he was accustomed to apply to that party, on proof of that fact the description contained in the will may be applied with entire certainty. If the will be written in a foreign language, it can be translated; if it contain terms which the writer ordinarily used in a peculiar sense, that can be shown; and if descriptions are made by names which he was in the habit of applying to the parties, his meaning can be gathered just as well from the use of those names as if he had employed the appellations by which they were commonly known. I have no doubt that this is a legitimate mode of interpreting a will, by the aid of extrinsic evidence in exposition of the habits and phraseology of the testator." So, where the testator has been accustomed to designate a person by his surname alone,<sup>3</sup> or his baptismal name alone,<sup>4</sup> or a pet name or nickname,<sup>5</sup> or even a wrong name,<sup>6</sup> these names, when appearing in his will, may be explained by proof of his usage.<sup>7</sup>

"For like reasons," as stated by Mr. REDFIELD,<sup>8</sup> "the same rule would apply to any unusual mode of designating his property, either his real or personal estate; as, if he should give Jenny, or Fannie, or Old Jim to certain persons, it would be proper to show that the testator called certain animals by those

accustomed to call certain members of his family, or others, by any *soubriquet*, such as pet names or nicknames, and such names occur in the will, parol evidence is receivable to show what persons he was accustomed to designate in this manner." 1 Redf. on Wills, 630.

<sup>8</sup> *Id.* 631.

<sup>1</sup> Ayres v. Weed, 16 Conn. 290.

<sup>2</sup> 4 Bradf. 163.

<sup>3</sup> Clayton v. Nugent, 13 Mee. & W. 200.

<sup>4</sup> Wigt. on Wills, 139.

<sup>5</sup> 1 Redf. on Wills, 630; Andrews v. Thomas, 1 Cox, 225.

<sup>6</sup> Lee v. Pain, 4 Hare, 251.

<sup>7</sup> "There is nothing better settled than that where it appears that the testator was

## Usage to Explain Wills.

names." Therefore, in the leading case of *Ryers v. Wheeler*,<sup>1</sup> the testator having given his "back lands" to devisees, it was held proper to inquire what portion of his property he was accustomed to designate by this name. Earlier, in *Austee v. Nelms*,<sup>2</sup> the testator owned a farm in the parish of Doynton. One piece of the land, being part of the farm, and surrounded by land in Doynton, was yet in fact in another parish. He devised all his lands in Doynton to his daughter, and the jury having found that he had always been accustomed to speak of the whole farm being in Doynton, it was held that the entire estate went, under the will, to the daughter. In *Goblet v. Beechey*,<sup>3</sup> Joseph Nollekens, an eminent sculptor, on the twenty-eighth day of January, 1822, executed the following codicil to his will: "Memorandum: That in case of my death, all the marble in the yard, the tools in the shop, *bankers, mod.*, tools for carving, the rasp in the draw with — and the draw in the parlor, shall be the property of A. Goblet." The court referred the matter to a master to ascertain the meaning of the words "bankers" and "mod." The master, acting on the opinion of three sculptors and statuaries, reported that, as used among sculptors, the word "banker" meant a solid piece of wood upon which blocks of marble were placed for the purpose of being carved, and that "mod." meant models, and not modelling-tools, as claimed by the defendants. Vice-Chancellor SHADWELL, on the hearing, said that if, in the judgment of three eminent sculptors, "mod." meant models, he would not consider himself warranted in putting a different interpretation upon the word, and gave a decree in favor of the plaintiff. But an appeal being taken, Lord BROUGHAM, who was then chancellor, reversed the decree upon another ground, and in a judgment which has been vigorously attacked by Sir JAMES WIGRAM.<sup>4</sup> In *Kell v. Charmer*,<sup>5</sup> the testator's will was in these words: "I give and bequeath to my son William the sum of *i. x. x.*; to my son Robert Charles the sum of *o. x. x.*" It was shown that the testator in his lifetime had carried on the business of a jeweller, and in the course of his business used certain private marks or symbols to denote prices or sums of money, and according to such system the letters *i. x. x.* and *o. x. x.* represented the sums of £100 and £200, respectively; and thereupon the Master of the Rolls ruled that this evidence was admissible to interpret the will. So, what the testator was in the habit of regarding as his "homestead" will explain the word when used by him in his will.<sup>6</sup> But a custom in Virginia to transfer land by death-bed donation, without a will, has been declared incompetent.<sup>7</sup> And it is held in Michigan that evidence of a custom among a particular class of settlers to give their farms to their eldest sons is not admissible to establish such a gift in a particular case, where no direct evidence of the gift is given.

<sup>1</sup> 22 Wend. 152. *ante*, p. 351.

<sup>2</sup> 1 Hurl. & N. 225.

<sup>3</sup> 3 Sim. 24.

<sup>4</sup> *Goblet v. Beechey*, 2 Russ. & M. 624.

<sup>5</sup> "If," said this distinguished authority on the Law of Wills, "any reasonable evidence showed that the word had any meaning, either as used by the public, by sculptors, or by the testator, Lord Brougham ought, it would seem, to have admitted the evidence, *ut res magis valeat*. If his lord-

ship's theories on questions of philosophy are not more solid than some of his legal decisions, he can be regarded as a Bacon only on the ground of being highly experimental." Wigr. on Wills (O'Hara), 141.

<sup>6</sup> 22 Beav. 195.

<sup>7</sup> *Hopkins v. Grimes*, 14 Iowa, 73. And see *Attorney-General v. Dublin*, 38 N. H. 512.

<sup>8</sup> *Westfall v. Singleton*, 1 Wash. (Va.) 227.

<sup>9</sup> *Gilman v. Riopelle*, 18 Mich. 145.



## Marine Insurance.

§ 201. **Evidence of Usage to explain Words and Phrases in Policies of Insurance.**—Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in a given case. This is the third of Mr. ARNOULD'S rules as to the admission of evidence of usage in the case of marine insurance, and which are cited with approval by subsequent authors.<sup>1</sup> The rule applies as well to the construction of contracts of fire and life insurance as to those of marine insurance. The words and phrases employed in policies may be obscure in themselves,—as, when they are entirely technical and local,—so as to be quite unintelligible to the generality of persons without explanation. In this case, the ambiguity as to their meaning arises upon merely reading them as they stand in the instrument; in other words, is patent on the face of it. So, again, although the words employed may have an ordinary meaning, which is sufficiently intelligible to people not engaged in the business to which they relate, yet if they have also another meaning when employed by those engaged in that business, and the circumstances of the case show that such secondary or less general sense must have been that in which they were used in the particular instrument whose meaning is sought to be ascertained, parol evidence must be equally resorted to in this, as in the former case, to explain the real meaning of the contract, by showing the sense in which the parties meant it to be understood.<sup>2</sup>

§ 202. **Same—Marine Insurance.**—Evidence of usage has been admitted to show that the word "corn" includes every kind of grain, and also beans and peas,<sup>3</sup> and malt,<sup>4</sup> but does not include rice;<sup>5</sup> that "salt" does not include saltpetre;<sup>6</sup> that the words "loading off shore" include loading at a bridge pier;<sup>7</sup> that "skins" include furs;<sup>8</sup> that "roots" are limited to such as are perishable in their nature, as beets and other garden roots, and do not include sarsaparilla;<sup>9</sup> that insurance upon an "outfit" of a whaler covers a quarter of the catchings;<sup>10</sup> that bundles of rods are considered as "bar-

<sup>1</sup> Angell, May, and others.

<sup>2</sup> Arnould on Ins. 89. And see Coit v. Commercial Ins. Co., 7 Johns. 385; Sleght v. Rhineland, 1 Johns. 193; s. c. 2 Johns. 532; Baker v. Ludlow, 2 Johns. Cas. 289; Astor v. Union Ins. Co., 7 Cow. 201.

<sup>3</sup> Mason v. Skurray, Park on Ins. 245.

<sup>4</sup> Moody v. Surridge, Park on Ins. 245.

<sup>5</sup> Scott v. Bourdillon, 2 Bos. & Pul. N. R. 214.

<sup>6</sup> Journu v. Bourdieu, Park on Ins. 245.

<sup>7</sup> Johnson v. North-Western, etc., Ins. Co., 39 Wis. 87.

<sup>8</sup> Astor v. Union Ins. Co., 7 Cow. 203.

<sup>9</sup> Coit v. Commercial Ins. Co., 7 Johns. 385; Baker v. Ludlow, 2 Johns. Cas. 289.

<sup>10</sup> Macy v. Whaling Ins. Co., 9 Mete. 354. "The question is," said Hubbard, J., "whether the term 'outfits,' as used in the second policy, covers the catchings, agreeably to the usage which is alleged to exist

that in an insurance on outfits, catchings are covered to one-fourth part of the amount of the outfits. The word 'outfits,' in its original use, as applying to ships, embraced those objects connected with a ship which were necessary for the sailing of her, and without which she would not, in fact, be navigable. It included the sails and rigging, boats, and provisions for the ship's crew; and it has long since been determined that such items enter into the value of the ship, and are covered by an insurance upon her. 1 Ph. on Ins. (1st ed.) 71, and authorities there cited. But in ships engaged in whaling voyages the word has acquired a much more enlarged signification. It has embraced within it not only the ordinary tackle and apparel of the ship, and the provisions for a common voyage from port to port, but the casks and staves, the fishing-gear, and the stores and clothing necessary for the

## Contracts of Marine Insurance.

iron;"<sup>1</sup> that live stock is comprehended within the term "cargo."<sup>2</sup> In *Taylor v. Briggs*,<sup>3</sup> where one of the subjects of a charter-party was cotton in bales,

successful prosecution of such voyages; articles not for sale, like a common outward cargo of a ship, but for consumption and use during a protracted voyage of years, and for the storing of the cargo or catchings to be obtained. These outfits have their value; and they are converted, either indirectly or directly, into cargo, by their consumption and use in procuring the cargo, and by the taking of the casks for the reception of the oil. In consequence of this, a usage has arisen in the adjustment of losses with underwriters by which the catchings have been substituted in the place of outfits, to a limited and reasonable extent, and which custom, in New Bedford, — the leading port in the world in the great whale-fishery, — has been introduced into and become a part of the written contract in their policies, to prevent any question as to the binding nature of the usage. 'Outfits' is a word, then, of originally limited meaning as applied to different trades and in its application to vessels, but it has acquired an enlarged meaning in the hands of merchants engaged in whaling voyages, adapted to their growing trade; and, as thus used, 'outfits' is a word not so clearly defined and strictly limited in its import, nor is it of that plain and decisive character that we are required necessarily to hold that it is used in policies without reference to an existing custom in this important branch of trade, or that the parties using it intended to confine its application to the outfits as they existed when the ship left her port of departure, and which were changing their character every day by consumption and use. The contracts of insurance are inflexible instruments; and the common policy, as used in whaling voyages, is, as to many of its provisions, in nowise applicable to the subject of this particular species of insurance. We are therefore called upon, by the nature of the contract and the character of the extensive trade to which it relates, to give it a liberal construction in order to do justice between parties. And, in view of the subject as presented to us, we are of opinion that such a usage is reasonable, and that evidence of the exist-

ence of it is admissible. Unless the parties shall agree upon the matter, it is to be submitted to a jury to inquire into the existence of such a usage, and whether the parties contracted in reference thereto; and the inquiry will be whether the usage is general to all who are concerned in the trade, or whether it is a local usage and confined to the ports of the Commonwealth; and if local, whether the merchants and underwriters in Nantucket and Boston are conversant with it, and practise upon it. And if the jury shall find that such usage is general, or, if local, is in force among the persons engaged in the trade as owners and underwriters, in Nantucket and Boston as well as at New Bedford, and that it enters into the construction of their contracts, where the word 'outfits' is used, without explanation, as extending to a portion of the catchings, then the policy effected at the Suffolk office will be held to extend to the catchings, in ascertaining the loss to be paid by these defendants. But if the custom is limited to the port of New Bedford, or is not well known or established in Nantucket and Boston, then it cannot be admitted to affect the construction of the defendants' policy, or to lessen the amount of their contributory share of the loss. A question has also been started, and may be necessary to be settled, whether the word 'cargo' includes within its meaning the outfits as well as the catchings; and, also, how far the policy at the Ocean office extended to catchings, while the outfits, sufficient in amount to cover the amount at risk, remained on board the vessel. These are important questions. The word 'cargo' is not of such common occurrence in English policies of insurance as with us. They use, in lieu thereof, the words 'goods and merchandise.' But 'cargo' is a word of a large import, and means the lading of the ship, of whatever it consists; and we see not, in principle, why it may not cover the outfits, which are goods of value, as well as the 'catchings,' which is the technical word that includes the blubber taken on board, the oil, and the cask. But, whether it should be so applied is not

<sup>1</sup> *Evans v. Commercial, etc., Ins. Co.*, 6 R. 1. 47.

<sup>2</sup> *Allegre v. Maryland Ins. Co.*, 2 Gill & J.

136; s. c. 6 Har. & J. 408; 20 Am. Dec. 425. 14 Am. Dec. 289.

<sup>3</sup> 2 Car. & P. 525. See also *Gray v. Harper*, 1 Story, 574.

## Geographical Terms.

parol evidence of the mercantile meaning was admitted to show what a "bale" was. In *Brough v. Whitmore*,<sup>1</sup> the custom of the trade that provisions sent out in the ship for the use of the crew should be considered as "furniture," within that word in a policy, was admitted, and controlled the decision. So, evidence of usage has been heard to show that the words "goods, specie, and effects," in a policy, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges *respondentia* interest.<sup>2</sup> In *Sleight v. Rhinelander*,<sup>3</sup> the Supreme Court of New York refused to receive evidence of the commercial meaning of the term "sea letter," in a policy of marine insurance, on the ground that the nature of the document was settled by public treaties and acts of Congress. On appeal, the Court of Errors, while construing the words as meaning a different thing from the meaning put upon them by the court below, and reversing the judgment on this ground, were likewise of opinion that if there had been any doubt or obscurity on the subject, parol testimony should have been admitted to explain it.<sup>4</sup> And proper evidence of a custom would be admissible to show that the words "whaling voyage" include the taking of sea-elephants on the beaches of islands and coasts, as well as the catching of whales wherever found;<sup>5</sup> that the word "proceeds" includes the identical goods insured, if brought back on the return voyage;<sup>6</sup> that the term "particular average," does not include expenses which are necessarily incurred in order to save the subject-matter of insurance from a loss for which the insurers would have been liable, and that these are usually allowed under the name of particular charges;<sup>7</sup> so, the words "port risk," in a policy, may be explained.<sup>8</sup> So, it was held in one case that the words "sail from St. Domingo in the month of October" were to be understood, when taken in connection with the usage of the trade, as indicating that the ship would not sail until the 25th.<sup>9</sup> And the phrase, "warranted to depart with convoy," has been literally construed according to the usage among merchants.<sup>10</sup>

Likewise, where geographical terms are used in a policy, it may be shown that the meaning put upon them by mercantile men is different from their common meaning as given in books. Thus, in *Udde v. Walters*,<sup>11</sup> decided in 1811,

free from doubt, because the word 'outfits' is so generally used to express the outward lading, from which it may be reasonably inferred that the word 'cargo' is limited by the parties to the catchings of the ship. But on this point we do not now feel called upon to express an opinion, as the case may again come before us, when the facts shall be more clearly settled by the further agreement of the parties or the verdict of a jury. We do not see any reason to confine the construction of the policy at the Ocean office to the 'outfits,' after there have been catchings obtained, until the outfits, to the amount of the sum insured, are exhausted; otherwise the plaintiffs, if no other policy had been effected, would have suffered, to a certain extent, if not wholly, their catchings to remain unprotected, which surely was not the design of the contract. Unless the parties

agree, the cause will be sent to a jury, to ascertain the existence of the custom alleged by the defendants, and its nature and extent, as herein stated."

<sup>1</sup> 4 Term Rep. 206.

<sup>2</sup> *Gregory v. Christie*, 3 Doug. 419.

<sup>3</sup> 1 Johns. 193.

<sup>4</sup> *Sleight v. Rhinelander*, 2 Johns. 582.

<sup>5</sup> *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26.

<sup>6</sup> *Dow v. Whetton*, 8 Wend. 160.

<sup>7</sup> *Kidston v. Empire Marine Ins. Co.*, L. R. 1 C. P. 535.

<sup>8</sup> *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453.

<sup>9</sup> *Chaurand v. Angerstein*, Penke N. P. 61; *Yates v. Duff*, 5 Car. & P. 369.

<sup>10</sup> *Lethulier's Case*, 2 Salk. 443. And see *Robertson v. French*, 4 East, 130.

<sup>11</sup> 3 Camp. 15.

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## Geographical Terms in Marine Policies.

the policy was from London to any port in the Baltic. The ship was captured while proceeding to Reval, in the Gulf of Finland. On the trial, the plaintiff proposed to call witnesses to prove that the Gulf of Finland is considered by nautical and commercial men as within the Baltic, although the two seas are treated by geographers as separate and distinct. The defendant answered that it might as well be contended that a policy to the Mediterranean would protect the ship in sailing to any port in the Adriatic or Black Sea. But Lord ELLENBOROUGH said: "I know not what the effect of the evidence offered may be, but I think it is clearly competent for the plaintiff to prove that the Baltic is *nomen generale*, comprehending, in common understanding, the gulfs and inlets which communicate with the sea laid down as the Baltic in geographical charts. If the Gulf of Finland is to be considered as within the Baltic, the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea." Several witnesses were then examined, who stated that all within the sound was considered as the Baltic; that licenses meant to protect ships to the Gulf of Finland were made out usually to the Baltic. Lord ELLENBOROUGH thought the evidence sufficient to establish the point in question, and the plaintiff had a verdict. A year later, in *Moxon v. Atkins*,<sup>1</sup> the policy was at and from Amelia Island to London. There was no port on the island, but a little farther up is Tigre Island, where ships usually stop, and in this case the cargo was loaded. Lord ELLENBOROUGH said: "The words of the policy cannot be literally understood, for there is no port in Amelia Island where the ship could load. The real question is, whether there has been a loading at Amelia Island, within the meaning of the parties, when the policy was effected. Strictly and locally, there has been no loading at Amelia Island; but it is possible that in mercantile contracts Amelia Island may denominate a region in which Tigre Island is comprehended. Essequibo has been held for some purposes to be Demerara, although the two settlements are quite distinct. There is the more familiar instance of Westminster being considered in London, the general name for the metropolis, yet we know that in strictness London only comprehends the limits of the city." Subsequently, in *Robertson v. Clarke*,<sup>2</sup> under a policy "from Van Diemen's Land to a port or ports of loading in India and the *Indian islands*," it was held in the Common Pleas that although among geographers Mauritius was deemed an African island, yet parol evidence was admissible to prove that in commercial language it was considered an Indian island. In *Gracie v. Maryland Insurance Company*,<sup>3</sup> the admission of evidence of a custom to consider the landing at the Lazaretto a landing at Leghorn was approved. In *Cobb v. Lime Rock Insurance Company*,<sup>4</sup> a usage at Boston not to regard the Strait of Northumberland as within the Gulf of St. Lawrence was held by the Supreme Court of Maine inadmissible, but only on the ground that it was a local and not a general usage, was not known to the party to be affected, and therefore could not bind him. In an Alabama case, evidence of usage was admitted for the purpose of showing that "the port of New Orleans" embraced the wharves on Lake

<sup>1</sup> 3 Camp. 200.<sup>2</sup> See *Mullan v. May*, 13 Me. & W. 511.<sup>3</sup> 1 Bing. 445; *Robertson v. Money, Ryan & M.* 75.<sup>4</sup> 8 Cranch, 75.<sup>5</sup> 58 Me. 326.

## Fire Policies.

Pontchartrain as well as the levees on the Mississippi.<sup>1</sup> The word "town," as used in a contract, may be shown to mean the town itself and the vicinity.<sup>2</sup>

§ 203. **Same — Fire Policies.** — Consort to the rule above stated, that when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, are the following cases: To an inquiry in an application for insurance upon a manufactory, "Are there casks in each loft constantly supplied with water?" the answer was, "There are in each room casks kept constantly full." *Held*, that evidence was admissible for the assured that among manufacturers the whole of a loft or story appropriated to a particular department was called "one room," although the same was divided by partitions with doors.<sup>3</sup> A policy on a country store covered, among other things, "store-fixtures." *Held*, that evidence of a well-settled custom among underwriters and the community generally, by which the terms

<sup>1</sup> *Mobile Marine, etc., Ins. Co. v. McMillan*, 37 Ala. 77. As to the effect of usage on the meaning of geographical words, see *Fay v. Alliance Ins. Co.*, 6 Gray, 455; "*city of London*," *Mallan v. May*, 13 Mees. & W. 511; "*harbor of Boston*," *Martin v. Hilton*, 9 Metc. 371.

<sup>2</sup> *Steyer v. Dwyer*, 31 Iowa, 20.

<sup>3</sup> *Daniels v. Hudson River Ins. Co.*, 13 Cush. 416. "If the plaintiffs intended to conform their answer to the question proposed, then it is manifest that in their view the word 'loft' in the question and 'room' in the answer would mean the same thing, and the effect of the answer would be that a cask was kept in each loft. This would raise another question: whether the term 'loft' would include the basement story, or only the chambers over the basement — the 'rooms aloft.' Or did it mean each story? These considerations are, perhaps, not material, except that they have some tendency to show that the word 'room' was used without any very precise or definite meaning. The evidence offered for the purpose of falsifying this representation was that there was in the basement story a partition, setting off a part for a particular purpose, in which no water-cask was kept; that in the next story above there was a small apartment partitioned off, in which there was no water-cask; and in the two stories above, the water-casks stood in the entryways by the doors of the main rooms, and not in the main rooms. If the plaintiffs, in answering the interrogatory as put, intended to say that there is a cask of water kept for each loft, or each story, the jury might well find that the representation was true; if they intended to use the word 'room' in a

narrower sense, so as to mean more than one apartment in each loft or story, then it becomes necessary to inquire what was the extent of the word 'room' as used in this answer. The word is certainly a familiar one in the English language, and, as ordinarily used and construed, as all words must be, by the subject-matter and the context, is not likely to be misunderstood; yet it is not without some considerable varieties of meaning. Apply it to a dwelling-house; and suppose one, in offering a house to be sold or let, should represent that there is a fireplace in every room. Suppose there is a cellar, or an attic, with or without windows, are they rooms? Or, suppose a large apartment into which the front door opens, used for the double purpose of an entry and for a sitting-room in warm weather, and furnished for that purpose, is it a room, within the representation that there is a fireplace in it? Or, suppose above stairs one or more small apartments, capable of being used as a closet or clothes-press, or for a bed-room, would the representation be falsified by showing that either of these divisions of the house had no fireplace in it? The language might be somewhat ambiguous, and requires aid to ascertain its meaning. \* \* \* In the present case, we are of opinion that there was sufficient uncertainty and ambiguity in the representation in question to warrant the introduction of evidence of usage; and it was a question of fact for the jury to decide, whether, according to the true meaning of the language used, the representation was substantially true when made, and substantially complied with afterwards."

## Fire Policies.

"fixtures" and "store-fixtures" were used in insurance to denote all the movable articles of shops and warehouses which are convenient and necessary for use in the course of trade, was admissible.<sup>1</sup> In the application for insurance, in answer to the question, "for what purpose the building was used," the plaintiff replied, "Tobacco-pressing; no manufacturing." It appeared that in a shed adjoining the main building tobacco-hogsheads were manufactured, and the company claimed that this was a breach of the warranty and vitiated the policy. *Held*, that the plaintiff might prove that the business of making the hogsheads in which the tobacco was packed was incident to, and appertained to the business of pressing, and by general custom was included, and understood to be included, in the term "tobacco-pressing," without being specially mentioned. "If such were the fact, there was no false warranty, and it was no more necessary for the plaintiff to state that branch of the business than the other."<sup>2</sup> In a policy of insurance against loss or damage by fire, one of the conditions was that the insurer would not be liable for "fire by lightning." *Held*, that the practice and usage of other insurance companies, restricting their liability to losses occasioned by actual burning by lightning, may be resorted to to show that the insurers, under such a policy, are not liable for the destruction of the house insured by its being rent and torn to pieces by lightning, without being burnt or consumed.<sup>3</sup> A building was described in a policy as "a frame house, filled in with brick." *Held*, that it was competent for the assured to prove a usage as between insurers and assured that a house filled in in front and rear, and supported on the one side by the wall of an adjoining house filled in with brick, and on the other by a brick wall of an adjoining house, was considered as a "frame house, filled in with brick," within the meaning of the policy.<sup>4</sup> A policy was written on a ship-builder's stock of ship-timber, "contained in the yard and buildings therein," bounded by certain streets. Evidence was offered and received to the effect that it was the custom of the owners of ship-yards to keep their stock of timber on the sidewalks and in the streets in the vicinity of their yards, as much so as within the yards. Some of the lumber destroyed was on the sidewalks, partly in the street and partly within the yard, which was in places unfenced. *Held*, that the evidence was properly received to show what was the meaning of the terms, "stock of ship-timber in a ship-yard," as used by the parties in the policy, and to define the term "yard," as applied to ship-building.<sup>5</sup> A policy on a machine-shop stipulated, "a watchman kept on the premises." *Held*, that evidence of the usage of similar establishments not to keep a watchman constantly, but only during portions of the twenty-four hours, was admissible to construe the meaning of the terms.<sup>6</sup> The property insured

<sup>1</sup> *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray, 359. "If," said Chapman, J., "the term 'store-fixtures' is a term of trade commonly used among traders and insurers, and is used in such a signification as to use any or all the articles mentioned as such in the report, those were insured by this policy. The parol evidence offered on this subject was proper, and ought to have been admitted."

<sup>2</sup> *Sims v. State Ins. Co.*, 47 Mo. 54.

<sup>3</sup> *Babcock v. Montgomery, etc., Ins. Co.*, 6 Barb. 637; *s. c.* 4 N. Y. 326.

<sup>4</sup> *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. 270; *Mead v. North-Western Ins. Co.*, 7 N. Y. 530.

<sup>5</sup> *Webb v. National Fire Ins. Co.*, 2 Sandf. 497.

<sup>6</sup> *Crocker v. People's Mutual Ins. Co.*, 8 Cush. 79. And see *Houghton v. Manufacturers' Ins. Co.*, 8 Mete. 114; *Percival v. Maine Mutual Ins. Co.*, 33 Me. 242.



## Fire Policies.

was described in the application and policy as a "brick dwelling-house and wood-house, \* \* \* occupied for the usual purposes by a tenant." It appeared that the "wood-house" was built at one time, had but one frame, was all under one roof, and was designed for one building—a wood-house and carriage-house; the wood-room constituted two-thirds or more of the entire building, and was separated from the carriage-room by a loose partition about seven feet high, which extended to the eaves on one side and not so high on the other side, leaving a distance of about seven feet between the top of the partition and the ridge-pole. In an action on the policy, the company set up as a defence a false representation on the part of the assured in stating there was no other building within four rods of the premises insured, claiming that the carriage-house—part of the wood-house—was a separate building, which should have been mentioned. *Held*, that the testimony of tenants and neighbors that the building in which the wood-house and carriage-room were had always been commonly known and described as the "wood-house," was admissible.<sup>1</sup> A policy on a two-story factory, with attic and basement, contained this provision: "Water on each floor, with hose, and a watchman is to be kept on the premises at night." *Held*, that evidence was proper to show that, according to the usage of the trade, neither the attic nor the basement were considered as "floors."<sup>2</sup> A policy contained a provision that it should not include "mills or manufactories of any kind." With the consent of the company, the owner kept hay, straw, produce, etc., on the premises; this he afterward gave up, and kept broom-corn, and made brooms by hand. *Held*, that evidence of usage was admissible to show that this occupation did not come within the prohibition of "mills and manufactories."<sup>3</sup>

On the other hand, in a New York case, where the house insured was described

<sup>1</sup> White v. Mutual Fire Ins. Co., 8 Gray, 566.

<sup>2</sup> New York Belting Co. v. Washington Fire Ins. Co., 10 Bosw. 428.

<sup>3</sup> Franklin Fire Ins. Co. v. Brock, 57 Pa. St. 74. "The tenth condition attached to the policy," said Strong, J., "in which it is declared that the policy shall not be construed to extend to mills and manufactories of any kind, has reference to the character of the real estate rather than to the uses to which it may be put. The building must itself be a mill or a manufactory, or it does not come within the tenth article. The fact that articles are made or manufactured in a dwelling-house or a store does not, of course, make it a 'manufactory,' within the meaning of this policy. Had clothes been made in the store, and had a sewing-machine been introduced and worked there, a jury would hardly find that it had become a manufactory, and, therefore, no longer insured. Is not a manufactory or a factory a building, the main or principal design or use of which is to be a place for producing articles as products of labor? There is no difficulty in understanding what is meant when we speak of a factory or manufactory. It is something

more than a place where things are made. You would probably hardly speak of a photograph establishment as a manufactory, or a painter's studio, or a book binder's shop, or a printing office. It is undoubtedly true that a building may be insured as a store or a dwelling house which may afterwards be converted into a factory. If it be under such a policy as these, it ceases to be insured. But it by no means follows that the partial use of it for making articles for use or sale make it a manufactory. The collocation of the words in this condition is of considerable weight in determining what the parties meant. Not only are the kinds of manufacturing business excepted from the policy named, but the real estate excepted is called 'mills or manufactories.' This would seem to indicate what was, in the minds of the parties, mills and manufactories; something known, recognized, called a mill: not merely a place where something might be ground, but what common usage recognizes as a mill; a manufactory: not merely a place where something may be made by hand or machinery, but what, in common understanding, is known as a factory."



## Bills of Lading.

in the policy as "standing detached," and did, in fact, stand about seven feet from any other building, evidence that the words "standing detached" meant that the subject of insurance should be at least twenty-five feet from another building, was held inadmissible. The phrase was considered not in the least ambiguous, and extrinsic proof could not be allowed to give it a meaning different from its plain import.<sup>1</sup>

§ 204. To explain Bills of Lading. — A bill of lading, like other receipts, is open to explanation, and the carrier may show that the actual amount which came into his hands is different from that stated;<sup>2</sup> and a custom which precludes the carrier, as between himself and an intermediate consignee, from explaining the bill of lading, and showing any error that may have occurred in stating the quantity, is bad.<sup>3</sup> Consequently it has been held proper to prove that, according to the usage of the transportation business, the words "quantity guaranteed," in a bill of lading for grain, meant that the bill of lading was conclusive evidence of the amount of grain to be delivered, and that if it fell short the carrier was to pay for the shortage.<sup>4</sup> Where a bill of lading recited that certain cotton was shipped on a specified steamboat, it was ruled admissible to show that by the custom of the river, when the river was low, barges were carried in tow, and freight stored, at the option of the carrier, on either the boat or the barge.<sup>5</sup> And where a railroad company received goods addressed to a point beyond its terminus, and gave a bill of lading for the transportation of the goods to its terminus, it was held that parol evidence was admissible to prove that there was a custom in such cases to deliver to a connecting carrier, such evidence not tending to vary or contradict the bill of lading.<sup>6</sup>

So, evidence of usage is admissible to explain a bill of lading, as to the time in which loading is to be done or delivery is to be made — as, for instance, whether the "days" in which the delivery is to be concluded are to be considered as working or running days,<sup>7</sup> or whether the "rainy days," which are to be excepted, apply to all days on which there is some rain, or only to those days when the rain is sufficient to prevent the loading or unloading of the vessel with safety and convenience.<sup>8</sup> The meaning of "Derby Line"<sup>9</sup> and "their freight,"<sup>10</sup> as used in these instruments, has been arrived at by evidence of usage; and "privilege of reshipping" has also been explained in the same way.<sup>11</sup> In an English case,<sup>12</sup> a majority of the Court of Exchequer held that the terms, in a letter to carriers of goods from their customers, "Please send the marbles not insured," were to be read, "according to the understanding of the language

<sup>1</sup> *Hill v. Hibernian Ins. Co.*, 10 Hun, 26.

<sup>2</sup> *Wolfe v. Myers*, 3 Sandf. 7; *Ward v. Whitney*, 3 Sandf. 399; *Blanchard v. Page*, 8 Gray, 287; *Backus v. The Marengo*, 6 McLean, 487; *Dickerson v. Scelye*, 12 Barb. 99; *Bowman v. American Express Co.*, 21 Wis. 152; *Lawson on Car.*, § 116.

<sup>3</sup> *Strong v. Grand Trunk R. Co.*, 15 Mich. 286.

<sup>4</sup> *Bissel v. Campbell*, 54 N. Y. 353.

<sup>5</sup> *McClure v. Cox*, 32 Ala. 617.

<sup>6</sup> *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81.

<sup>7</sup> *Higgins v. United States Mail Steamship Co.*, 3 Blatchf. 282; *Cochran v. Reiberg*, 3 Esp. 121. See *Commercial Steamship Co. v. Boulton*, L. R. 10 Q. B. 346.

<sup>8</sup> *Balfour v. Wilkins*, 9 Cent. L. J. 56.

<sup>9</sup> *Connecticut, etc., R. Co. v. Baxter*, 32 Vt. 805.

<sup>10</sup> *Noyes v. Campbell*, 29 Vt. 79.

<sup>11</sup> *Broadwell v. Butler*, 6 McLean, 286.

<sup>12</sup> *Peck v. North Staffordshire, etc., R. Co.*, 10 H. L. Cas. 473.

## Charter-Parties.

between carriers and their customers," and in that light they were interpreted to convey a request to carry the marbles at the owner's risk. This decision, which was upon the construction of the seventh section of the Railway and Canal Traffic Act,<sup>1</sup> was, however, reversed in the House of Lords. Where a railroad company gives a receipt for freight, "to be delivered to R. R. agent" at the terminus of the road, and the agent deposits it at that place in a warehouse not belonging to the company, evidence of its custom to deposit freight in that warehouse is admissible.<sup>2</sup> And though a bill of lading of cotton, to be carried by river, states the price at which it is to be transported, the carrier is not precluded from showing the existence of a custom on the river to charge lighterage, in addition to the freight, whenever the tide is so low throughout the season as to prevent cotton-boats from passing shoals.<sup>3</sup>

§ 205. To explain Charter-Parties and other Maritime Contracts. — Evidence of usage has been frequently resorted to to explain charter-parties and maritime contracts of like character<sup>4</sup>—as, for instance, the terms "freight," "freight measurement,"<sup>5</sup> and "loading in turn,"<sup>6</sup> as used in such instruments, have been construed thereby. In *Birch v. De Peyster*,<sup>7</sup> an action of *assumpsit* was brought by the owners of a ship against the captain for the amount of freight received by him. By the contract between the parties, the defendant was to receive a stipulated sum in lieu of "privilege" and "primage." The freight claimed had been earned in respect of goods carried in the cabin, and the principal question was whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account. On the trial, the defendant proposed to give in evidence a conversation between the parties before the agreement was entered into, in the course of which it had been expressly stated by the plaintiff that the defendant was to have the use of the cabin entirely to himself; but the plaintiffs contended that no evidence was admissible by way of explanation, except as to the general meaning of the term "privilege," in mercantile understanding. GIBBS, C. J., admitted the evidence, saying: "The distinction which you take is, that evidence may be received to show what the mercantile part of the nation mean by the term 'privilege,' just as you would look into a dictionary in order to ascertain the meaning of a word, and that it must then be taken to have been used by the parties in its mercantile and established sense. But I think that the word 'privilege' is of so indeterminate a signification that I must receive this evidence. It is certainly evidence, and, in the way in which it is offered, falls within the general current of mercantile understanding, since they had, previous to the agreement, a conversation on the subject of 'privilege.' To this extent it is evidence, if not further; and if the term has been used in different trades in

<sup>1</sup> 17 & 18 Vict., c. 31.

<sup>2</sup> *Alabama, etc., R. Co. v. Kidd*, 29 Ala. 221; s. c. 35 Ala. 209.

<sup>3</sup> *Andrews v. Roach*, 3 Ala. 590.

<sup>4</sup> *Robertson v. Wait*, 8 Exch. 299; *Phillips v. Briard*, 1 Hurl. & N. 21; *Bottomley v. Forbes*, 5 Bing. N. C. 1; *Ogden v. Parsons*, 21 How. 167; *Norden Steamship Co. v. Dempsey*, L. R. 1 C. P. Div. 654; *Philadelphia, etc.,*

*R. Co. v. Northam*, 2 Ben. 1; *Barker v. Borzone*, 48 Md. 474.

<sup>5</sup> *Felsch v. Dickson*, 1 Mason, 11; *Gibson v. Young*, 2 J. B. Moo. 224.

<sup>6</sup> *Robertson v. Jackson*, 2 C. B. 413; *Schultz v. Liedeman*, 14 C. B. 39; *Hudson v. Clementson*, 18 C. B. 213.

<sup>7</sup> 1 Stark. N. P. 210.

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 Charter-Parties.
 

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different ways, the conversation is evidence to show in what sense it was used on the present occasion."

In the case of *Browne v. Byrne*,<sup>1</sup> which was an action for freight by a ship-owner against the indorsee of a bill of lading, to whom goods had been delivered at Liverpool, and who had accepted them, the bill of lading making them deliverable, "he paying freight for them five-eighths of a penny sterling per pound, with £5 per cent primage and average accustomed," it was held that evidence was admissible that by the custom of Liverpool the ship-owner was entitled to a deduction of three months' discount from the freight, though such custom applied only to goods coming from ports in the Southern States of America. "Here," said COLERIDGE, J., "the contract is to pay freight on delivery, at a certain rate per pound. Is it inconsistent with this to allege that by the custom the ship-owner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment. The custom does not set this aside; indeed, it adopts it as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the ship-owner undertakes to allow three months' discount on freight paid after that rate. The latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed—or if, from the language of it, the intention of the parties could have been collected—that the freight, at the specified rates, should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above. \* \* \* But the contract settles the rate of freight; whether or not discount is to be allowed on the payment, it leaves open, and to that the custom applies." So, where, by a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of "80s per cwt., gross weight, tallow and other goods, and grain or seed in proportion, as per London-Baltic printed rates," it was held that extrinsic evidence was admissible to show that by the usage of the trade the meaning of the bill of lading was, that 80s per hundred-weight of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured.<sup>2</sup> In another case, the facts were that by charter-party the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, and other produce." It appeared that it was the custom at Trinidad to load sugar in hogsheads and molasses in puncheons, in which mode they were carried more conveniently, and with less loss to the merchant, and that a full and complete cargo of sugar and molasses meant a cargo so packed. It was held, both in the Court of Exchequer and Exchequer Chamber, that the custom was admissible in evidence, for it was applicable to such a charter-party, and did not control, but only explained the contract, which should be construed with reference to the usage at the port of lading.<sup>3</sup> In the Court of Exchequer, ALDERSON, B., said: "It is not admissible if it contradicts the charter-party itself. The charter-party is the contract, and the only contract, between the parties. No

<sup>1</sup> 3 El. & Bl. 703; 13 Jur. 700. See the comments on this case in *Cuthbert v. Cumming*, 10 Exch. 809.

<sup>2</sup> *Russian Steam Nav. Co. v. Silva*, 13 C. B. (N. S.) 610.

<sup>3</sup> *Cuthbert v. Cumming*, 10 Exch. 809; 11 Exch. 405.

## Charter-Parties.

evidence can be given to contradict or alter its effect; but then its effect must be clear, from the wording of the document itself. There is a perfect right to explain the contract and show what it really means, according to the words used by the parties. It may be shown that 'a full and complete cargo of sugar and molasses' means, in truth, a full and complete cargo of sugar and molasses packed in the ordinary way in which sugar and molasses are packed to be carried. That was, in fact, the evidence received. It was not evidence to alter or control the contract, but to show what the contract really was." By a charter-party it was agreed between the plaintiff, a ship-owner, and the defendants, merchants at Manchester, that the plaintiff's ship should sail to Bombay and there load a cargo of cotton, and proceed with it to Liverpool, and "deliver the same, on being paid freight at the rate of 75s per ton of fifty cubic feet delivered, the freight to be paid on right delivery of the cargo." The ship sailed to Bombay and received a cargo of cotton, which, previous to being loaded, had been subjected, in accordance with the usual practice, to a high hydraulic pressure, so as to reduce its compass. On being landed at Liverpool the cotton expanded, and the plaintiff claimed freight on its measurement when delivered, and not when shipped. In the Court of Exchequer it was held that evidence that it was the custom of the Bombay trade to pay freight for cotton goods, under charter-parties similarly worded, on the measurement of the goods at the port of shipment, was admissible to explain the contract.<sup>1</sup> Where it was stipulated in a charter-party that the ship should be unloaded, weather permitting, at a certain rate per diem, to reckon from the time of the vessel being ready to unload, and "in turn to deliver," it was held that the charterers had a right to prove that the contract was entered into with reference to a known and recognized use of the words, "in turn to deliver," among persons conversant in the trade.<sup>2</sup> So, in an action upon a charter-party for freight upon goods shipped at Bombay for London, stating that cotton was to be "calculated at five cubic feet per ton," a usage was held admissible to prove that the measurement was to be calculated when the cotton was taken from a screw at Bombay, though it appeared that it afterwards expanded considerably before it was put on board, and that it would have given a third measurement after it had been unloaded.<sup>3</sup>

<sup>1</sup> *Buckle v. Knoop*, L. R. 2 Exch. 125.

<sup>2</sup> *Bottomley v. Forbes*, 6 Scott, 816 5 Bing.

<sup>3</sup> *Robertson v. Jackson*, 2 C. B. 412; *Liedeman v. Schultz*, 14 C. B. 38.

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## CHAPTER V.

### ON THEIR INADMISSIBILITY WHEN IN CONFLICT WITH CONTRACTS, STATUTES, OR LAWS.

#### ILLUSTRATIVE CASES: —

29. *Blackett v. Royal Exchange Assurance Company*. — Usages contradicting terms of written contracts inadmissible.
30. *Brown v. Foster*. — Usages in conflict with express agreements inadmissible.
31. *Noble v. Durell*. — Customs contrary to statutes bad.
32. *Barnard v. Kellogg*. — Usages in conflict with rules of law inadmissible.
33. *Raisin v. Clark*. — Usages in conflict with rules of public policy illegal.

- NOTES:** § 206. Usages inadmissible when repugnant to express contracts.
207. Usages repugnant to express contracts — Carrier and customer.
  208. Same — Insurance policies.
  209. Same — Landlord and tenant.
  210. Same — Contracts of hiring.
  211. Same — Contracts for work and labor.
  212. Same — Principal and agent.
  213. Same — Bankers and brokers — Bills and notes.
  214. Same — Vendor and purchaser.
  215. Same — Miscellaneous.
  216. The effect of statutes on usages and customs.
  217. Words defined by act of Parliament — Contrary usages void.
  218. Statutes as to officers' duties — Inconsistent usages.
  219. Statutes prohibiting usury — Contrary usages.
  220. Statutes as to shipping-articles and carriers — Customs.
  221. Miscellaneous statutes and repugnant usages.
  222. Statutory exemptions cannot be waived by usage.
  223. Statutes may be construed by usage.
  224. Municipal charters and powers as affected by usage.
  225. Customs and usages not inadmissible because in conflict with common-law rules.
  226. Contradictory expressions of some courts on this subject.
  227. Same — Conflicting decisions.
  228. Banks and banking — Usages against legal rules admitted.
  229. Same — Usages against legal rules rejected.
  230. Common carriers — Usages in conflict with rules of law admitted.
  231. Same — Usages in conflict with rules of law rejected.
  232. Corporations — Usages against common-law rules admitted.

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 Illustrative Cases.
 

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- NOTES: § 233. Insurance — Usages in conflict with legal rules admitted.  
 234. Same — Usages in conflict with legal rules rejected.  
 235. Landlord and tenant — Customs against law admitted.  
 236. Contracts for personal services — Customs against law admitted.  
 237. Same — Customs against law rejected.  
 238. Partnership — Usages against legal rules admitted.  
 239. Principal and agent — Usages in conflict with rules of law admitted.  
 240. Same — Usages in conflict with rules of law rejected.  
 241. Vendor and purchaser — Usages against legal rules admitted.  
 242. Same — Usages against legal rules rejected.  
 243. Miscellaneous — Usages contradicting rules of law admitted.  
 244. Same — Usages contradicting rules of law rejected.  
 245. The necessity for reviewing the contradictory cases.  
 246. The facts and opinions of the judges in the above cases.  
 247. Same — The above cases examined.  
 248. The meaning of the rule that a usage must not conflict with the law.

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 29. USAGES CONTRADICTING TERMS OF WRITTEN CONTRACTS INADMISSIBLE.
 

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BLACKETT *v.* ROYAL EXCHANGE ASSURANCE COMPANY.\**In the English Court of Exchequer, Hilary Term, 1832.*Hon. JOHN SINGLETON, Baron LYNDHURST, *Lord Chief Baron.*

Sir JOHN BAYLEY, Kt.,	} <i>Barons.</i>
" WILLIAM GARROW, Kt.,	
" JOHN VAUGHAN, Kt.,	
" WILLIAM BOLLAND, Kt.,	
" JOHN GURNEY, Kt.,	

In an action on a policy of insurance on a ship, her tackle, apparel, **boat, and other furniture**, evidence of a usage that boats slung on the outside of the ship, on the quarter, are not protected is inadmissible, as contradicting the express terms of the contract.

COVENANT on a policy of assurance at and from London to Calcutta on the ship *Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture, in the usual form, with the memorandum, "Free from average, under £3 per cent, unless general."

At the trial before VAUGHAN, B., at the London Sittings, the plaintiffs having proved the loss of a boat, which, with other damage subsequently incurred by stress of weather, amounted to more than £3 per

\* Reported 2 Crompt. &amp; J. 244; 2 Tyrw. 268.

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 Blackett v. Royal Exchange Assurance Company.
 

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cent, the defendants offered evidence of a usage that boats slung upon the outside of the ship, on the quarter, were not protected by the policy. It had been proved on the part of the plaintiffs that such slinging was proper and necessary in voyages of the description insured against. The learned baron was of opinion that such evidence of usage was inadmissible, and he accordingly rejected it.

In Michaelmas Term, the *Attorney-General* obtained a rule accordingly, citing *Pelly v. Royal Exchange Assurance Company*.<sup>1</sup>

*Spankie*, Serjt., and *Maule* showed cause. — The evidence of usage was properly rejected. The words "boat," etc., are express, unequivocal words, and evidence of usage was clearly inadmissible to contradict their import.<sup>2</sup> If parol evidence had been received in this case, it would have been received to vary an express, unambiguous, written contract. It was proved at the trial that the boat was properly slung, and that it would have been improper if it had not been so slung. Indeed, even if it had been improperly stowed negligence in that respect on the part of the master would have furnished no defence. It would be extremely dangerous to admit, on such a question, evidence of a usage at Lloyd's, which only amounts to a usage not to pay, a species of prescription *de non solvendo*.

The *Attorney-General*, *Campbell*, and *Follett*, *contra*. — Usage may be resorted to for the purpose of getting at the meaning of words of this description. The evidence was offered to show that the general usage of trade, and particularly at Lloyd's, was that the underwriters did not pay on the loss of boats slung over the quarters. Such an universal usage showed the understanding of the parties, and what they had in their contemplation. Mercantile contracts are always to be construed according to the meaning in which they are understood by mercantile men. Evidence of usage has been admitted to prove that goods stowed on deck were not within a general policy on goods. So, in *Gabay v. Lloyd*,<sup>3</sup> evidence of a usage was admissible to explain the ambiguous meaning of the word "mortality," a warranty against which had been held, in *Lawrence v. Aberdeen*,<sup>4</sup> not to extend to a case where animals died in consequence of the agitation of a ship in a storm. It is true that in *Gabay v. Lloyd* the evidence of usage was unsuccessfully offered, but it was admitted for the purpose of showing (if it had been strong enough to do so) that the manner in which the animals perished was

<sup>1</sup> 1 Burr. 341.

<sup>2</sup> *Parkinson v. Collier*, *Park on Ins.* 416;  
1 Ph. on Ev. (6th ed.) 539.

<sup>3</sup> 5 Barn. & Cress. 797; 5 Dears. & B. C. C. 641.

<sup>4</sup> 5 Barn. & Adol. 107.



## Illustrative Cases.

not such a loss as the policy contemplated, and that the underwriters did not pay such losses.

In the last of the cases on the subject of goods stowed on deck, the question was not as to the propriety of their being stowed there, but whether, being so stowed, they were protected by the policy, in which they were not specifically named. Evidence of usage was admitted to show that the underwriters must have been aware of the practice of stowing goods of the description in question on deck, and the proof that they were usually stowed on deck was considered as tantamount to proof that the underwriters were aware of it. In *Palmer v. Blackburn*,<sup>1</sup> evidence of the usage of settling the loss on a policy on freight was admitted.

Lord LYNCHURST, C. B., now delivered the judgment of the court.

There were two questions in this case: one, whether parol evidence of a usage was admissible to show that for boats on the outside of the ship, slung upon the quarter, underwriters never paid; the other, upon the construction of the clause, "Free from average, under £3 per cent," whether the underwriter is answerable for every instance of damage, however small, if the aggregate *in toto* amount to £3 per cent, or whether each instance where the damage it occasions can be ascertained, and is under £3 per cent, is to be excluded; and we are against the defendants upon both. The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the Thames. There is no exception; and the policy is, therefore, upon the face of it, upon the whole ship, on all her furniture, and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that upon such voyage as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, — any words which might admit of doubt, — nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used; that, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but

<sup>1</sup> 1 Bing. 61.

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Blackett v. Royal Exchange Assurance Company.

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upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain. The cases which are collected in 1 *Phillips on Evidence*<sup>1</sup> and *Starkie on Evidence*<sup>2</sup> clearly establish this position; and a reference is made to the same subject in the second volume of Mr. PHILLIPS' book.<sup>3</sup> The authority referred to in the argument, as to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods which ought not to be placed in the ordinary stowage; but, in a more perilous situation, he ought to be apprised either of the nature of the goods or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation. This, as it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried; they are in more than usual peril; and a usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts. The policy is upon goods generally, and the usage explains what description of goods is intended, viz.: goods of ordinary, not of extraordinary danger.

We are therefore of opinion that the evidence of usage was properly rejected.

*Rule discharged.*

<sup>1</sup> Pages 553-559.

<sup>2</sup> Pages 1032-1038.

<sup>3</sup> Pages 36, 37.

## Illustrative Cases.

## 30. USAGES IN CONFLICT WITH EXPRESS AGREEMENTS INADMISSIBLE.

## BROWN v. FOSTER.\*

*In the Supreme Judicial Court of Massachusetts, September Term, 1873.*HON. HORACE GRAY, *Chief Justice.*

" JOHN WELLS,	} <i>Associate Justices.</i>
" JAMES D. COLT,	
" SETH AMES,	
" MARCUS MORTON,	
" WILLIAM C. ENDICOTT,	
" CHARLES DEVENS, JR.,	

A. agreed to make B. a "satisfactory" suit of clothes. A. afterwards delivered the clothes to B., but B. returned them to A., with a notice that they did not fit, and were unsatisfactory. In a suit by A. against B. for the price: *held*, that evidence that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations that might be necessary to make them fit, was inadmissible because it contradicted the terms of an express contract.

**CONTRACT to recover the price of a suit of clothes.**

At the trial, in the Central District Court of Worcester, the defendant contended, and there was evidence tending to show, that the clothes were to be made and delivered to the defendant in North Brookfield, on or before a specified day, and that they were to be made to the satisfaction of the defendant.

It was agreed that the clothes were delivered on the evening of the day specified, which was Saturday, and that on the following Monday the defendant returned them to the plaintiff by the same person who delivered them, with written notice that the clothes did not fit, were unsatisfactory, and were not accepted.

The defendant offered evidence that the clothes did not fit him, and that they were not made in the manner and form agreed upon. While the defendant was testifying, the plaintiff produced the clothes in court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and having put them on, wore them in the presence of the court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations before they could be called a good fit, but that such alterations could be easily made without injury to them. He also offered evidence that he wrote

\* Reported 113 Mass. 136.

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a letter to the defendant the same day the clothes were returned, in which the following language was used: "Can't you come and let us see what the trouble with the fit of your clothes is? From what you say about the coat, we think we could remedy that; and we could make another vest if necessary, and coat too." To this letter the defendant replied that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made.

There was evidence that the defendant came to the plaintiff's store soon after the clothes were returned, and the plaintiff asked him to try them on, to see what alterations, if any, were necessary to make them fit; this the defendant refused to do.

There was also evidence to show that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations which might be necessary to make them fit.

The defendant asked the court to give the following instructions to the jury: —

"1. If you find that the plaintiff agreed to make the clothes in question to the satisfaction of the defendant, and failed so to do, then the plaintiff cannot maintain this action, and you will return a verdict for the defendant.

"2. If you find that the plaintiff agreed to deliver the clothes on or before a specified time, made up in the manner and form agreed upon, and failed so to do, then the defendant was under no obligation to accept them, and you will return a verdict in his favor."

The court refused to give the instructions in the form prayed for, but, after giving instructions upon the other points raised, to which no objections were made, instructed the jury as follows: —

"The plaintiff was bound to make the clothes of the material ordered, in a workman-like manner, and to deliver them at the time agreed upon by the parties. If the plaintiff agreed to make the clothes to the satisfaction of the defendant, he was bound to do so, with these qualifications: If, when the clothes were delivered, there were defects in the fit of them, such as are liable to occur in first-class tailoring establishments, but such as could be easily remedied, and a custom among tailors has been proved to remedy such defects when they occur, the plaintiff was entitled to a reasonable opportunity therefor; and if he was willing, and offered to remedy said defects, and the defendant refused to allow him to do so, the plaintiff is entitled to recover, if the other facts in the case are proved."

## Illustrative Cases.

The jury returned a verdict for the plaintiff, and the defendant excepted.

*B. W. Potter* and *G. H. Ball*, for the defendant; *A. Thayer*, for the plaintiff.

DEVENS, J. — There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant, upon a day certain, a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made, and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant, and to furnish materials therefor, contracting that the articles, when manufactured, should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered.<sup>1</sup>

When an express contract, like that shown in the present case, was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect.<sup>2</sup> The evidence admitted was of this description.

*Exceptions sustained.*

<sup>1</sup> *McCarren v. McNulty*, 7 Gray, 139.

<sup>2</sup> *Dickinson v. Gay*, 7 Allen, 29, 31.

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Noble v. Durell.

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## 31. CUSTOMS CONTRARY TO STATUTES BAD.

## NOBLE v. DURELL.\*

*In the Court of King's Bench, May, 1789.*Rt. Hon. LLOYD, Lord KENYON, *Lord Chief Justice.*

Sir WILLIAM HENRY ASHHURST, Kt.,	} <i>Judges.</i>
" FRANCIS BULLER, Bart.,	
" NASH GROSE, Kt.,	

Where a statute declares that every pound of butter shall weigh sixteen ounces, a custom that every pound of butter sold in a particular market-town shall weigh eighteen ounces is bad.

THIS was an action of trespass for taking the plaintiff's butter. The defendants, in their plea, after stating that Southampton was a corporation by prescription, and that they annually held a court-leet or view of frankpledge, at which a jury is sworn and continues in office till the next court, justified as to some of the jury taking the butter under the following custom: "That every pound of butter exposed to sale in the said markets of the said town, within the said town, should be, and ought to be, of the weight of eighteen ounces," alleging that the butter in question weighed more than sixteen, but less than eighteen ounces to the pound. To this plea there was a general demurrer and rejoinder.

*Gibbs*, in support of the demurrer, insisted that the custom could not be supported, because it was against the law of the land. There are several statutes which direct that there shall be only one weight throughout the kingdom.<sup>1</sup> And the 11 Hen. VII., c. 4, directs that the knights, etc., shall cause to be delivered one of every weight and measure which the king had caused to be made of brass, according to the standard in the Exchequer, to certain towns therein mentioned, of which Southampton is one. Those statutes meant that there should be an uniformity of weight, for at that time there was a difference between things sold by troy and avoirdupois weight.<sup>2</sup> The statute 13 & 14 Car. II., c. 26, after reciting that frauds had been practised in selling butter under weight, directs that every kilderkin shall contain one hundred and twelve pounds, every pound containing sixteen ounces. Now, this custom attempts to set up a particular weight for Southampton; but a custom against an act of Parliament cannot be supported.<sup>3</sup>

\* Reported 3 Term Rep. 271.

<sup>1</sup> Edw. III., st. 1, c. 2; 13 Rich. II., c. 9; 15 Rich. II., c. 4; 8 Hen. VI., c. 5; 11 Hen. VII., c. 4; 12 Hen. VII., c. 5.

<sup>2</sup> Dalt. Just. 248, c. 112; stat. 27 Edw. III., st. 2, c. 10; 2 Rich. II., st. 1, c. 1; 4 Inst. 273.

<sup>3</sup> *Grisling v. Wood*, Cro. Eliz. 85.

## Illustrative Cases.

Here the custom requires that a pound shall weigh more than a pound, which leaves untouched a question respecting which some doubt has been entertained: whether a custom that butter shall be sold in lumps of a certain weight is good.

*Burrough, contra.* — The object of weights and measures is that there shall be one certain and known weight; and it is as convenient to the inhabitants of a particular town to have a pound to consist of eighteen as of sixteen ounces. This is a customary weight, and not originally introduced by statute. It is said, indeed, in *Magna Charta* that there shall be one weight and one measure, but it does not specify what that weight or measure shall be; it leaves the matter as it stood before. Therefore, a custom which existed before of a particular weight was not done away by that statute. In the case of ale, corn, and some other things, there is reference to the weights and measures in London, but not so in the case of butter. The statute *tractatus de penderitis et mensuris* (which must have been passed as early as the time of Edward I.,<sup>1</sup> because *Fleta*<sup>2</sup> mentions it in almost the same words) is the first statute that speaks of troy weight. But it is not pretended that butter was ever bought or sold by troy weight. "And notwithstanding it is directed by *Magna Charta*, and the several statutes cited, that there shall be but one weight, there always have been, and still are two kinds of weights used in England, and both warrantable, the one by law and the other by custom, yet confirmed also by statute."<sup>3</sup> This, then, may be supported as a customary weight. A custom may be set up in opposition to the common law, or even statute, where it is an affirmative act. "There is a diversity between an act of Parliament in the negative and in the affirmative, for an affirmative act doth not take away a custom."<sup>4</sup> So, by 27 Hen. VI., c. 5, a fair or market shall not be held on a Sunday, upon a forfeiture of all goods sold to the lord of the franchise. "And yet a prescription to hold a fair on the 29th of September is good, though it may be on a Sunday; for a fair on that day is not void, though the goods then sold shall be forfeited by the 27 Hen. VI., c. 5.<sup>5</sup> It is enacted by the statute 27 Edw. III., st. 2, c. 10, that there shall be but one weight, etc., and it speaks of avoirdupois weight, but it does not say what the avoirdupois weight shall be; and that statute was passed to prevent a particular kind of fraud practised by buying with one weight and selling with another. With respect to the statute 13 & 14 Car. II., c. 26, that only applies to butter sold

<sup>1</sup> 31 Edw. I.<sup>2</sup> Lib. 2, c. 12.<sup>3</sup> Dalt. Just., c. 112; 2 Shaw, 36.<sup>4</sup> Co. Lit. 115 a.<sup>5</sup> Com. Dig., tit. "Market," D; Cro. Eliz.



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by the wholesale, for it directs that every kilderkin of butter shall contain one hundred and twelve pounds, every pound containing sixteen ounces. It is of importance that this custom should be supported, since it may affect other customary rights in several parts of the kingdom where butter is sold by the yard or pint. But, even supposing that the statutes on this subject destroyed all the customs, still the plaintiff should have replied, that in point of fact the weights were sent to Southampton as directed by the 11 Hen. VII., c. 4; for, till they were sent to the different towns there enumerated, the old customs were in force. In *Heaton v. Ashdown*,<sup>1</sup> where, to an action of trespass for breaking and entering the plaintiff's close, etc., the defendant pleaded a prescriptive right of common on the place in question for cattle, etc., except such parts of the said close where the plaintiff, and those whose estate he had, had immemorially cut the underwood there growing, and had enclosed such parts thereof with a fence to prevent the future growth of the wood for three successive years next after such cutting down, etc., and issue thereon, a verdict had been found for the defendant, a motion was then made to enter up judgment for the plaintiff, on the ground that the prescription was bad, as setting up a right contrary to the provisions of the statute 35 Hen. VIII., c. 17, sect. 7, that statute having directed that woods, when cut down, should be enclosed for seven years (and enlarged by 13 Eliz., c. 25, to nine years). To this it was answered, on the part of the defendant, that in the case of common woods the statute prescribes a particular mode of enclosing and cutting, and that it was necessary for the plaintiff, if he meant to avail himself of the statute, to have shown by his replication that he had acted conformably to the directions of the statute, and that the statute had left the general right of common upon the same footing as before, and consequently that the prescription was rightly pleaded. And the court being of this opinion, discharged the rule.

Lord KENYON, C. J. (stopping *Gibbs*, in reply). — In deciding this question, I wish not to be understood to say that a custom may not prevail that butter shall be sold in lumps or yards, containing any given number of ounces; but the question now before the court is, whether a custom in Southampton that a pound shall contain eighteen ounces can be supported in law. To say that it can would be to violate all the rules of language, as long as the acts of Parliament which have been cited are to regulate this subject. This has engaged the attention of the legislature for five centuries, and they have thought it of the utmost importance that there should be one standard of weights and measures

<sup>1</sup> B. R., T., 18 Geo. III., c. 7.

## Illustrative Cases.

throughout the kingdom. But it is said that there is no objection as to the force of reason and convenience why this rule should not be relaxed in a particular town, because, when the exception is once established, the inhabitants of that town will square their notions accordingly. But it is material to consider whether the exception to the rule will be confined to butter only. If this custom can be established, it may also be extended to hops in Kent, or to any other commodity in any other part of the kingdom, and thus the greatest confusion will be introduced on a subject that ought to be particularly plain. So, one measure might prevail in Pool, another at Dartmouth, etc., and thus foreign merchants would never know on what terms they were treating. It might be as well contended that a custom could prevail in a particular place that a less number of days than seven should constitute a week, or that a less space of ground than an acre should be called an acre. It was then objected that, even supposing that the statute of Henry VII. applied universally, the old customs should prevail till the weights and measures were sent down from the Exchequer, which was directed to be done by that act, and that the plaintiff should have replied that in point of fact they were sent to Southampton. But the legislature did not say that till that was done the old customs should prevail; and we cannot suppose that that which the legislature directed was not done. The statute 13 & 14 Car. II., c. 26, takes it for granted that a pound shall consist of sixteen ounces, and that the weights and measures had been sent to the different parts of the kingdom. There are two kinds of weights, — one containing twelve ounces of a certain denomination, the other, sixteen ounces of another denomination, — and it appears that butter has always been sold by the latter. Then it was said that customs may prevail against common law, but they are such *consuetudines* as are reasonable and beneficial; but this is the reverse of both, for all mankind have concurred in agreeing that for their mutual convenience they should be regulated by one uniform standard.

ASHHURST, J. — The only ground on which this custom can be supported is a supposition that the legislature did not intend to interfere with the customs of any particular place. But that is totally unfounded, for the legislature supposed that at the times when the several acts passed, different weights and measures prevailed in different towns, to remedy which inconvenience they passed those acts. And in none of them is there any reservation of any ancient customs, but they are applicable to every place, directing that in future there shall be but one weight and measure throughout the kingdom.

BULLER, J. — This case does not interfere with the question alluded

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to in the argument: whether a custom to sell butter in lumps of any particular weight is good or not. That question will remain, notwithstanding this decision, as it did before; and I have never seen anything in the acts of Parliament requiring persons not to sell more or less than a pound. But the question here is whether, when a person is selling butter under the specific denomination of a pound, he shall be compellable to sell more than a pound. Butter is directed to be sold by avoirdupois weight, where a pound consists of sixteen ounces. Then how can a person who professes to sell a pound of butter be compellable to sell more than a pound? I am of opinion that the custom cannot be supported.

GROSE, J. — Of the same opinion.

*Judgment for the plaintiff.*

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32. USAGES IN CONFLICT WITH RULES OF LAW INADMISSIBLE.

BARNARD v. KELLOGG.\*

*In the Supreme Court of the United States, December, 1870.*

HON. SALMON PORTLAND CHASE, *Chief Justice.*

" SAMUEL NELSON,	} <i>Associate Justices.</i>
" NOAH H. SWAYNE,	
" DAVID DAVIS,	
" WILLIAM STRONG,	
" NATHAN CLIFFORD,	
" SAMUEL F. MILLER,	
" STEPHEN J. FIELD,	
" JOSEPH P. BRADLEY,	

1. The custom of merchants and dealers in wool cannot control the general rules of law as to the sale of personal property.
2. A., a wool-broker in Boston, sent to B., a wool-dealer in Hartford, samples of foreign wools in bales, which he was selling on commission, and B. offered to purchase at the prices stated, if equal to the samples. A. accepted the offer, provided B. would come to Boston and examine the wool. B. went to Boston, and after examining a portion of the bales (and having the opportunity to examine all and open them, which he declined), purchased the wool. It proved, however, unknown to A.'s principal, to have been deceitfully packed, and much in the interior of the bales was rotten and worthless. In an action brought by B. against the principal to recover damages, it was held that the rule of  *caveat emptor* applied, and that evidence was not admissible to control that rule, and to show that by the custom of merchants and dealers in wool in bales in Boston and New York, — the two principal markets in the country for wool, — there is an implied warranty by the seller to the purchaser that the wool is not falsely or deceitfully packed.

\* Reported 10 Wall. 383.

## Illustrative Cases.

ERROR to the Circuit Court for the District of Connecticut, the case being this: —

In the summer of 1864, Barnard, a commission merchant residing in Boston, Massachusetts, placed a lot of foreign wool received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of Bond & Co., wool-brokers in Boston, to sell, with instructions not to sell unless the purchaser came to Boston and examined the wool for himself. These brokers sent to E. N. Kellogg & Co., merchants and dealers in wool in Hartford, Connecticut, at their request, samples of the different lots of wool, and communicated the prices at which each lot could be obtained. Kellogg & Co., in reply, offered to take the wool, all round, at fifty cents a pound, if equal to the samples furnished; and Bond & Co., for their principal, on Saturday, the sixth day of August, by letter and telegram accepted this offer, provided Kellogg & Co. examined the wool on the succeeding Monday, and reported on that day whether or not they would take it. Kellogg & Co. acceded to this condition, and the senior member of the firm repaired to Boston on the day named, and examined four bales in the broker's office as fully as he desired, and was offered an opportunity to examine all the bales, and have them opened for his inspection. This he declined to do, and concluded the purchase on the joint account of all the plaintiffs. Some months after this, on opening the bales, it was ascertained that a portion of them were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, which were concealed by an outer covering of fleeces in their ordinary state. This condition of things had been unknown to Barnard, who had acted in good faith. It was, however, communicated to him, and he was asked to indemnify the purchaser against the loss he sustained in consequence of it. This he declined to do, and the purchaser brought this suit. The declaration counted —

*First.* Upon a sale by sample.

*Second.* Upon a promise, express or implied, that the bales should not be falsely packed.

*Third.* Upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing.

The court below, trying the cause without the intervention of a jury, held that there was no express warranty that the bales not examined should correspond to those exhibited at the broker's store, and that the law, under the circumstances, could not imply any. But the court found as matters of fact that the examination of the interior of the bulk of bales of wool, generally put up like these, is not customary in the trade;

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and, though possible, would be very inconvenient, attended with great labor and delay, and for these reasons was impracticable; and that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of this country where such wool is sold, there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed; and the court held as a matter of law that the custom was valid and binding on the parties to this contract, and gave judgment for the purchaser.

This writ of error was taken to test the correctness of this ruling.

Mr. Justice DAVIS delivered the opinion of the court.

No principle of the common law has been better established or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it; because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quantity or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of *caveat emptor* in this country that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.

Applying this acknowledged rule of law to this case, it is easy to settle the rights of the parties and to interpret the contract which they made. That the wool was not sold by sample, clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to

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Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know, or have reason to believe, that the wool was falsely packed. The sale on his part was intended to be upon the usual examination of the article, and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales, because, if inconvenient, it was still practicable; and that is all, as we have seen, that the law requires. The case of *Salisbury v. Stainer*<sup>1</sup> is similar in its facts to this case, and the court applied to it the rule of *caveat emptor*. There bales of hemp were sold, which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample, but the court said to him: "You were told to examine for yourself, and having opened one bale, and at liberty to open all, and omitting to do it, you cannot be permitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty." It is therefore clear, by the general principles of law adopted in the interests of trade and commerce, that the seller in this instance was not answerable over for any latent defects in the bales of wool.

But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller, implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

It is to be regretted that the decisions of the courts defining what local usages may or may not do have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them; and on this account, mainly, the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this intrinsic evidence. It does

<sup>1</sup> 19 Wend. 158.



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not go beyond this; and is used as a mode of interpretation, on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it.<sup>1</sup> "Usage," says Lord LYNKHURST, "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."<sup>2</sup> And it is well settled that usage cannot be allowed to subvert the settled rules of law.<sup>3</sup> Whatever tends to unsettle the law, and make it different in the different communities into which the State is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court in *Thompson v. Ashton*,<sup>4</sup> "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In *Dickinson v. Gay*,<sup>5</sup> which was a sale of cases of satinets made by samples there were, in both the samples and the goods, a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that by custom there was, in such a case, a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of *Dodd v. Furlow*<sup>6</sup> is more conclusive on the point. There, forty bales of goat-skins were sold by a broker, who put into the memorandum of sale, without authority, the words, "to be of merchantable quality and in good order." It was contended that, by custom, in all sales of such

<sup>1</sup> See notes to *Wigglesworth v. Dallison*,  
<sup>1</sup> Smith's Ld. Cas. 498; <sup>2</sup> Pars. on Con. 535,  
§ 9; Taylor on Ev. 943.

<sup>2</sup> *Blackett v. Royal Exchange Assur. Co.*,  
<sup>2</sup> Crompt. & J. 249; *ante*, p. 413.

<sup>3</sup> See note to 1 Smith's Ld. Cas., *supra*.

<sup>4</sup> 14 Johns. 317.

<sup>5</sup> 7 Allen, 29.

<sup>6</sup> 11 Allen, 426.



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skins there was an implied warranty that they were of merchantable quality, and, therefore, the broker was authorized to insert the words; but the court held the custom itself invalid. They say: "It contravenes the principle which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing, but which also engrfts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject." It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in *Frith v. Barker*<sup>1</sup> was whether a custom was valid that freight must be paid on goods lost by peril of the sea, and Chief Justice KENT, in deciding that the custom was invalid, says: "Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law." In *Woodruff v. Merchants' Bank*,<sup>2</sup> a usage in the city of New York that days of grace were not allowed on a certain description of commercial paper was held to be illegal. NELSON, C. J., in giving the opinion of that court, says: "The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;" and adds: "If the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." And in *Beirne v. Dodd*,<sup>3</sup> the evidence of a custom that, in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that State on the subject is the case of *Simmons v. Law*.<sup>4</sup> That was an action to recover the value of a quantity of gold-dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading, by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: "A clear, certain, and distinct contract is not sub-

<sup>1</sup> 2 Johns. 327.<sup>2</sup> 25 Wend. 673.<sup>3</sup> 1 Seld. 96.<sup>4</sup> 3 Keyes, 219.

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ject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined."

In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the State allowed evidence of usage that in the city of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part nor actual warranty.<sup>1</sup> Chief Justice GIBSON at the time dissented from the doctrine; and the same court, in later cases, has disapproved of it,<sup>2</sup> and now hold that a usage, to be admissible, "must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American notes to *Wigglesworth v. Dallison*,<sup>3</sup> where the cases are collected and distinctions noticed.

The necessity for discussing this rule of evidence has often occurred in the highest courts of England, on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note to *Wigglesworth v. Dallison*, and are not different in principle from the general current of American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable.

These rules, says Chief Justice WILDE, in *Spartali v. Benecke*,<sup>4</sup> "are well settled, and the difficulty that has arisen respecting them has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved." But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rules of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty which the law did not raise nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do; and, by the terms of the contract, the law placed on the buyer the risk of the purchase, and relieved the

<sup>1</sup> Snowden v. Warner, 3 Rawle, 101.

<sup>2</sup> Cox v. Heisley, 19 Pa. St. 243; Wetherill v. Neilson, 20 Pa. St. 448.

<sup>3</sup> 1 Smith's Ld. Cas. 498.

<sup>4</sup> 10 C. B. 222.

## Illustrative Cases.

seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade, in the manner proposed by the custom of dealers of wool in Boston, it is easy to see it can be changed in other particulars, and in this way the whole doctrine frittered away.

It is proper to add, in concluding this opinion, that the conduct of the parties shows clearly that they did not know of this custom, and could not, therefore, have dealt with reference to it.

Judgment reversed and the cause remanded, with directions to award a *venire de novo*.

BRADLEY and STRONG, JJ., dissented.

*Judgment reversed.*

## 33. USAGES IN CONFLICT WITH RULES OF PUBLIC POLICY ILLEGAL.

## RAISIN v. CLARK.\*

*In the Court of Appeals of Maryland, October Term, 1874.*

Hon. JAMES L. BARTOL, *Chief Justice.*

“ JAMES A. STEWART,	} <i>Associate Justices.</i>
“ JOHN M. ROBINSON,	
“ RICHARD GRAYSON,	
“ RICHARD H. ALVEY,	
“ OLIVER MILLER,	
“ RICHARD J. BOWIE,	
“ GEORGE BRENT,	

It is a rule of law that an agent cannot act as such for both vendor and purchaser, and receive payment for his services from both. Therefore, a custom among brokers in the city of Baltimore that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the value of the property exchanged, is invalid.

ACTION to recover commissions. The opinion states the case.

*R. R. Boorman and William A. Fisher*, for the appellant; *Fielder C. Shinguff*, for the appellee.

MILLER, J., delivered the opinion of the court.

\* Reported 41 Md. 158; 20 Am. Rep. 66.

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Ralsin v. Clark.

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The appellant is a real-estate broker, doing business in Baltimore city, and as such was employed by Mr. Cooper to sell for him his farm in Baltimore County. As Cooper's agent, he advertised the farm for sale; and the appellee, seeing the advertisement, called upon him and proposed to exchange a house she owned in the city for the farm, and the exchange was effected. Cooper paid the appellant the usual commission of two and a half per cent on \$6,000, the value placed upon the properties so exchanged, and in this action he seeks to recover the like commission from the appellee. He places his claim on two grounds: First, upon an express agreement or contract between the appellee and himself that she should pay him such commission in case the exchange was effected; and, second, upon an alleged custom or usage among brokers in the city of Baltimore that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the amount or value of the property exchanged.

The testimony is conflicting as to the making of the alleged agreement, but the question presented for the determination of this court by the present appeal is whether such an agreement, if made, can be enforced by the agent by an action founded thereon. That the appellant was Cooper's agent to sell his farm, and that the alleged agreement, if ever made, was entered into while this employment continued, are conceded facts in the case. In this state of facts, could he lawfully become the agent of the party by whom the farm was purchased, by way of exchange of property? In our opinion, it is very clear he could not. It is a general rule that a party cannot, in any agency of this kind, act as agent or broker for both vendor and vendee in respect to the same transaction, because in such case there is a necessary conflict between his interest and his duty. The vendor, in the employment of an agent to sell his property, bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit.

It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interest of the principal, as far as he lawfully may. The seller of an estate is presumed to be desirous of selling it at as high a price as can fairly be obtained for it, and the purchaser is equally presumed to desire to purchase it for as low a price as he may. The interest of the two are in conflict. *Emptor emit quum minimo potest; venditor vendit quum maximo potest.* But if the same party be allowed to act as agent for both, it becomes his interest to have this maxim reversed, or at least to sacrifice the interests of one or both of his principals in order to advance his own, by receiving double commissions. Hence, the law will not permit an agent of the vendor, whilst

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that employment continues, to assume the essentially inconsistent and repugnant relation of agent for the purchaser.<sup>1</sup> In a very recent English case,<sup>2</sup> the plaintiff employed a broker to purchase a particular ship, on the basis of an offer of £9,000, or as cheaply as he could; but eventually the ship was purchased for £9,250. Prior to the sale, an arrangement had been made between the vendor and a broker, Scott, that if the latter could sell the ship for more than £8,500, he might retain for himself the excess; and it was arranged between Scott and the defendant, without the knowledge or sanction of the plaintiff, that defendant should receive from Scott a portion of this excess, and he accordingly received £225, part of the excess over £8,500. On discovering this, the plaintiff brought an action for money had and received, against the defendant for the £225, and the Court of Queen's Bench sustained the action and allowed the recovery. In the course of his opinion, COCKBURN, C. J., declared the law on the subject to be well and compendiously stated in *Story on Agency*<sup>3</sup> (to which we have referred), in these terms: "Indeed, it may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers." In the case before us, the appellant testified that he informed Cooper that the appellee was to pay him commissions if the exchange was made. This would probably prevent a recovery from him by Cooper of such commissions, in case they had actually been paid by the appellee; but it does not follow from this that he can enforce the contract against the appellee, and compel her to pay them. The rule to which we have adverted forbids the courts to entertain an action founded upon such a contract. Nor does it prevent the application of the rule that this was an exchange of properties, and not a sale of the farm for money. The reasons upon which the sale is founded apply with equal force whether money or property, at an ascertained value, be received by the vendor for the property he parts with. It is, perhaps, possible for the same agent to serve both parties to such transaction honestly and faithfully, but it is very difficult to do so, and the temptation to do otherwise is so strong that the law has wisely interposed a positive prohibition to every such attempt. As said by Judge STORY in one of the sections of his book on *Agency*, already referred to, "it is to interpose a preventive check against such tempta-

<sup>1</sup> *Story on Ag.*, §§ 210, 211; *Schwartz v. Yearly*, 31 Md. 278.

<sup>2</sup> *Morrison v. Thompson*, 9 Law Rep. 480.

<sup>3</sup> Sect. 211.

## General Rules.

tions and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

After what has been said, it is hardly necessary to add that the usage or custom relied on cannot avail the appellant. A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice. The appellant is, therefore, not entitled to recover on either ground upon which he bases his claim. The rulings of the court rejecting his two prayers accord with the views above expressed; and it follows that error, if there be any, in granting the appellee's second prayer has resulted in no injury to the appellant, and the judgment must be affirmed.

*Judgment affirmed*

## NOTES.

§ 206. Usages inadmissible when repugnant to Express Contracts.-- Usages and customs are never allowed to operate against an express contract. Lord LYNDHURST's language in *Blackett v. Royal Exchange Assurance Company*, "Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain," states in a very concise manner the limits to the admission of evidence of this character in the case of express contracts. "No usage or custom," said CATON, J., in an Illinois case,<sup>2</sup> "can be admitted to vary or control the express terms of a contract, but they may be admitted to determine that which by the contract is left undetermined. The parties by the contract may abrogate any custom, no matter how ancient or uniform, but such custom cannot abrogate the terms of a contract. Whenever there is a conflict, the contract must control. The reason why a custom is allowed to be proved for the purpose of interpreting a contract is because both parties are supposed to have been acquainted with it, and to have contracted in reference to it. The custom does not become a part of the law of the place, but rather a part of the contracts which are to be performed at the place; and hence, if the usage is excluded by the contract, it cannot constitute a part of it." "When," says Mr. Justice MILLER, "this [usage] is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and, therefore, needing no such aid in its construction, it amounts to establishing the principle that a custom may add to, or vary, or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts."<sup>3</sup> It has therefore been held in a large number of cases that no

<sup>1</sup> *Ante*, p. 413.

<sup>2</sup> *Dixon v. Dunham*, 14 Ill. 394.

<sup>3</sup> *Partridge v. Insurance Co.*, 15 Wall. 375.

## Carrier and Customer.

usage or custom repugnant to the terms of an express contract, either written or verbal, is admissible to control or contradict the terms of such contract. Many of these cases are irreconcilable, the conflict arising from a difference of opinion on the part of individual judges as to whether a particular usage did or did not contradict the plain import of the express agreement or written instrument. Thus, the judgment of the Court of Exchequer in *Blackett v. Royal Exchange Assurance Company*<sup>2</sup> was spoken of with disapproval by the Court of Common Pleas in *Humphrey v. Dale*, and an examination of the cases in the succeeding sections of this chapter<sup>3</sup> will show that the question before the court has not, in many instances, been tested by very certain rules. In our opinion, the true test as to whether a usage is repugnant to the contract was laid down by Lord CAMPBELL in the case last cited, where he said that, to fall within the exception of repugnancy, *the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent*. Mr. BROWNE,<sup>4</sup> referring to Addison's advice to young authors indulging in metaphors, to first see whether they are capable of being painted, considers it a safe rule for those who have to decide whether a usage will attach an incident to an express contract, or not, to ascertain whether they can be written down together without producing contradiction or nonsense.

In the next sections will be found those usages and customs which have been rejected by the courts on account of their repugnancy to express contracts in different relations and occupations. It will be seen that the rule above stated has, in many instances, not been applied.

### § 207. Usages repugnant to Express Contracts — Carrier and Customer. —

The express contract between carrier and customer cannot be varied by evidence of usage. Thus, the meaning of the letters "C. O. D.," in an express receipt, being so well known to the public, an attempt in a New York case to give them by usage a different meaning was unsuccessful.<sup>5</sup> In *Simmons v. Law*,<sup>6</sup> under a bill of lading for the carriage of treasure from San Francisco, via the Isthmus, to New York, which made the carrier liable as such for its transportation across the Isthmus, evidence was held inadmissible to prove that it was the custom of shippers of treasure to insure it against risks upon the Isthmus, or that there was a custom by which the carrier of gold refused to assume any risk of transportation across the Isthmus. This, of course, is but

<sup>1</sup> *Boddish v. Fox*, 23 Me. 90; *Hinton v. Locke*, 5 Hill, 437; *Blevin v. New England Serew Co.*, 23 How. 420; *Exchange Bank v. Coleman*, 1 W. Va. 69; *Savings Bank v. Ward*, 100 U. S. 163; *Knox v. The Ninetta*, Crabbe, 634; *Snelling v. Hall*, 107 Mass. 134; *Dutch v. Harrison*, 37 N. Y. S. C. (T. & C.) 306; *Mercantile Ins. Co. v. State Ins. Co.*, 25 Barb. 319; *Erwin v. Clark*, 13 Mich. 10; *Bryan v. Spurgin*, 5 Sneed, 681; *Fay v. Strawn*, 32 Ill. 295; *Corbett v. Underwood*, 83 Ill. 324; *Spears v. Ward*, 48 Ind. 547; *Rafert v. Seroggins*, 20 Ind. 195; *Beil v. Smith*, 99 Mass. 617; *Macomber v. Parker*, 13 Pick. 182; *Stultz v. Locke*, 47 Md. 502; *Cooke v. England*, 27 Md. 14; *Bradley v. Wheeler*, 4 Robt. 18; 44 N. Y. 436;

*Bank of Commerce v. Bissell*, 72 N. Y. 615; *Chandler v. Belden*, 18 Johns. 157; *Parsons v. Miller*, 15 Wend. 361; *Wadsworth v. Olcott*, 6 N. Y. 64; *Lane v. Bailey*, 47 Barb. 395; *Holmes v. Pettingill*, 1 Hun. 316; *Mackenzie v. Schmidt*, 22 Am. L. Reg. 448; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Vail v. Rice*, 5 N. Y. 155; *Farmers', etc., Bank v. Logan*, 74 N. Y. 568; *Maguire v. Woodside*, 2 Hill. 59.

<sup>2</sup> *Ante*, p. 413.

<sup>3</sup> *Post*, §§ 207-215.

<sup>4</sup> *Browne on Usages & Customs*, 26.

<sup>5</sup> *Collender v. Dinsmore*, 55 N. Y. 209.

<sup>6</sup> 8 Bosw. 213; 3 Keyes, 217.



## Contracts of Carriage.

an illustration of the rule, discussed at length elsewhere, that a usage cannot be set up to contradict the terms of a contract.

Where the law has attached a certain meaning to a term in a bill of lading, evidence of a custom to include within the term something additional is not admissible.<sup>1</sup> Thus, in *The Reeside*,<sup>2</sup> Mr. Justice SROXY refused to admit evidence of a custom among ship-owners that the exception of "dangers of the seas," in a bill of lading, extended to all losses except those arising from their neglect. In like manner, the words "perils of the seas" having been judicially construed not to cover an injury to a cargo by rats or other vermin,<sup>3</sup> it was properly ruled in *Aymer v. Astor*,<sup>4</sup> though by a divided court, that evidence of mercantile usage and understanding at New York and New Orleans was not admissible to show that injury by rats was included in the exception of "perils of the seas" in a bill of lading. And a loss by an accidental fire not being within this phrase,<sup>5</sup> a custom to include it therein is subject to the same objection. But it is nevertheless held in Alabama that a carrier may show by parol evidence that an exception of the "dangers of the river," as embodied in a bill of lading, by usage and custom includes dangers of fire.<sup>6</sup> But the decision in *Sampson v. Gazzam*,<sup>7</sup> and other Alabama cases, that the words "dangers of the river," in a bill of lading, may be shown by custom and usage to include dangers by fire, though followed in subsequent cases in the same State where the identical question was presented, has been carefully restricted in its application, the court being evidently unwilling to extend the principle in the least. Therefore it has been held by the same court, in actions against carriers for the non-delivery of goods upon bills of lading containing only the above exception, that evidence of a custom among steamboatmen to ascend the river as high as the water permits, and then land the cargo and deposit the goods in warehouses there,<sup>8</sup> or exempting them from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew, is inadmissible.<sup>9</sup> Where a bill of lading contained the words, "with shipper's reconsignment option," evidence that by usage the option was exercised by the consignee also, was held incompetent.<sup>11</sup>

So, where a carrier contracts to transport property in a certain way, a failure to follow his express contract or directions will amount to a deviation, for which he will be liable, and which will not be affected by a custom on the part of the carrier to follow the course adopted by him in the particular case.<sup>12</sup> Thus, on the receipt of an anchor, with directions to deliver at the consignee's place of

<sup>1</sup> *Lawson on Car.*, § 125.

<sup>2</sup> 2 Sumn. 567. And see *Baxter v. Leland*, Abb. Adm. 348.

<sup>3</sup> *The Isabella*, 8 Ben. 139; *Kay v. Wheeler*, 36 L. J. (C. P.) 180; L. R. 2 C. P. 302; *Laveroni v. Drury*, 16 Jur. 1024; 8 Exch. 106; *The Miletus*, 5 Blatchf. 335.

<sup>4</sup> 6 Cow. 266.

<sup>5</sup> *Lawson on Car.* 240, § 165; *Gilmore v. Carmen*, 1 Smed. & M. 279; *Merrill v. Arey*, 3 Ware, 215; *Cox v. Peterson*, 30 Ala. 608; *Union Mutual Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disney, 480.

<sup>6</sup> *Garrison v. Memphis Ins. Co.*, 19 How. 312.

<sup>7</sup> *Hibler v. McCartney*, 31 Ala. 561; *Sampson v. Gazzam*, 6 Port. 123; *Ezell v. Miller*, 6 Port. 367; *Ezell v. English*, 6 Port. 397, 311; *McClure v. Cox*, 32 Ala. 617; *Jones v. Pitcher*, 32 Stew. & P. 135.

<sup>8</sup> 6 Port. 123.

<sup>9</sup> *Cox v. Peterson*, 30 Ala. 608.

<sup>10</sup> *Boon v. The Belfast*, 40 Ala. 184 (overruling *Steele v. McTyer*, 31 Ala. 667).

<sup>11</sup> *McGovern v. Heissenbuttel*, 8 Ben. 46.

<sup>12</sup> *Hutch. on Car.*, § 310, and cases cited.

## Terms cannot be Altered by Usage.

business, the obligation of the carrier is not satisfied by a delivery at a wharf, although such was his custom in all similar cases;<sup>1</sup> and placing a horse in an open car, when the owner ordered it to be placed in a closed car, will make a railroad company responsible for its loss or injury from such change, though its custom was to carry horses in either kind of car indiscriminately.<sup>2</sup> An instructive case on this point is *Bazin v. Steamship Company*.<sup>3</sup> The defendant's agent at Havre issued a bill of lading containing the following clause: "Received in and upon the steamship called *Shannon*, now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise, to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship *City of Manchester*, or other steamship appointed to sail for Philadelphia on Wednesday, the sixth day of September, and failing shipment by her, then by the first steamship sailing after that date for Philadelphia." Another of the defendant's steamships, the *City of Philadelphia*, was to sail from Liverpool to Philadelphia on the 30th of August, and it happened that the cases of merchandise unexpectedly arrived at the former port before that day, and therefore the defendant shipped a portion of the cases on the *City of Philadelphia*, reserving the remainder for the *City of Manchester*. The goods sent by the latter steamship arrived at Philadelphia in due season and in good order, but those sent by the former were, on account of the wreck of the *City of Philadelphia*, lost. In an action to recover the value of the goods lost, the defendant set up a usage on the part of shippers and steamship companies to have goods shipped at the earliest time and by the first vessel sailing after their receipt. But the defendant was held liable, Mr. Justice GRIER saying that the express contract must prevail. Where wheat was to be transported by the carrier to New York on account and order of the plaintiff, and the bill of lading contained the memorandum, "Notify E. S. Brown, N. Y.," and the carrier delivered the wheat to Brown instead of to the plaintiff, it was held not admissible to show that by the custom of New York, under such bills of lading, property was rightly delivered to the person to be notified.<sup>4</sup> In a very recent English case, the defendant chartered a vessel from the plaintiff for a particular voyage. In the charter-party it was agreed that, after loading, the vessel should proceed to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, both ports included, as ordered, or "so near thereto as she could safely get," and deliver the cargo on being paid freight. The vessel, on being ordered for Hamburg, sailed for that port, but on account of her draught of water she could not get nearer to Hamburg than Stade, at which place the plaintiff offered to deliver the cargo, or so much of it as would lighten the ship and enable her to proceed. The defendant refused to accept any of the cargo at Stade; and, in order to earn the freight, the plaintiff discharged part of the cargo into lighters, in which it was conveyed to Hamburg, and there delivered to the defendant's agent. The vessel, being thus lightened, arrived at Hamburg, and delivered the remainder of the cargo. The action was for breach of the charter-party in refusing to accept any of the cargo at Stade, and the plaintiff claimed as damages the expense incurred by him for lighterage from Stade to

<sup>1</sup> *Wardell v. Murrillan*, 2 Esp. 683.<sup>2</sup> *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228.<sup>3</sup> 3 Wall. Jr. 229.<sup>4</sup> *Bank of Commerce v. Biasell*, 72 N. Y. 615; *Farmers, etc., Bank v. Erie R. Co.*, 72 N. Y. 188.

## Maritime Contracts — Insurance Policies.

**Hamburg.** The defendant pleaded a custom of the port of Hamburg, by which he was not bound to accept at any place but Hamburg. On demurrer to this plea, the Court of Appeals held that the custom of Hamburg could not override the express agreement in the charter-party, and that the plaintiff was entitled to the lighterage expenses.<sup>1</sup>

In *Phillips v. Briard*,<sup>2</sup> the declaration stated that by charter-party it was agreed between the charterers and the owner of a ship called the *Maggie*, being in the London docks, that the ship would load a cargo and therewith proceed to Hong Kong, and deliver the same on being paid freight, "the ship to be conveyed to the charterer's agents in China free of commission on the charter;" that, according to the custom of merchants in London, whenever a ship chartered in London for China is agreed to be conveyed to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents, as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from such port, and they are entitled to be paid the usual broker's commission on the amount of the freight payable under such contract, but in case the owners of the ship procure a charter or a cargo for the ship for the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such right is excluded by special contract; that although the ship was loaded, and arrived in China, and the plaintiffs' agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready to procure a charter or a cargo from Hong Kong, and although the plaintiffs performed all conditions precedent, the defendant, without any default of the plaintiffs' agents, procured a cargo for voyage from Hong Kong, and without any such default procured a cargo to the United Kingdom, the usual broker's commission on which amounted to a large sum, yet the defendant has not paid or allowed the same to the plaintiffs or their agents, whereby the plaintiffs were obliged to pay their agents a compensation in respect thereof. It was held, under these circumstances, that the declaration was bad, since the custom did not explain or annex an incident to the contract, but made a new contract. "Here," said POLLOCK, C. B., "it is sought not to explain the contract by the custom, or to add to it some incidental matter not inconsistent with what is expressed, but to impose on the party, who has entered into one contract, another and a different obligation, and because he has agreed to consign the ship to the charterers' agents on the outward voyage, to make him liable to pay the agents' commission on the homeward cargo. If that could be done, where is it to stop?"

Where a railroad company agreed to transport a certain quantity of hay, no time being mentioned, for a certain price, a custom of railroads for all special rates to expire at the end of each year was rejected.<sup>3</sup> And an express contract by the sender of a message with a telegraph company cannot be varied by the usage of a local office.<sup>4</sup>

§ 208. **Same — Insurance Policies.** — Where a policy was upon "the body, tackle, apparel, ordnance, munition, boat, and other furniture of the ship

<sup>1</sup> *Hayton v. Irwin*, 28 Week. Rep. 665.

<sup>2</sup> 1 Hurl. & N. 21.

<sup>3</sup> *Martin v. Union Pacific R. Co.*, 1 Wy. Ter. 143.

<sup>4</sup> *Grinnell v. Western Union Tel. Co.*, 113 Mass. 229.

## Terms cannot be Altered by Usage.

called the 'Thames,'" Lord LYNDHURST refused to admit evidence of a usage at Lloyd's that boats slung on the ship's quarter were not protected by such policy. Where oil had been lost by leakage, caused by the violent laboring of the ship in a cross sea, Lord DENMAN refused to admit evidence of a mercantile usage that unless the cargo was shifted or the casks damaged, underwriters were not liable for leakage as a "peril of the sea."<sup>2</sup> So, evidence is inadmissible to show that the words "glass-ware in casks," in the memorandum of excepted articles in a fire policy, according to the common understanding of insurers, means such ware in open casks only.<sup>3</sup> Where the policy was on "the Swedish brig Sophia," this was held to be a warranty that the vessel was Swedish, and evidence was rejected which was offered to show that the vessel was in fact an American ship. "The cases mentioned," said PARKER, C. J., "in which the usage of trade has been held to control the description of a voyage in the policy are by no means analogous. The underwriter and the assured are both presumed by law to make their contracts with reference to such usages, and they in fact make a part of the contract. But there cannot be a usage by which a warranty that a vessel was neutral should be held to mean that she was not neutral, but only pretended to be so."<sup>4</sup> And so it was said in the Supreme Court of the United States, in a more recent case, in reference to a usage as to the rate of premium to be paid: "Tested by these principles, the usage attempted to be set up cannot be sustained. It contradicts directly the written contract. It proposes to set aside all that was said about the rate of premium, and substitute the discretion of one of the parties to the instrument. It goes upon the assumption that all that is written in the contract which fixes, or ascertains, or limits the amount that may be claimed for premium of insurance by the company is nugatory, and that the whole field is left open, and the power placed in the hands of one of the parties exclusively. No such usage can be admitted thus to contradict, vary, and control this contract."<sup>5</sup> And in a subsequent case in the same court, where the policy read, "To a port in Cuba, and at and from thence to a port of advice in Europe," evidence of a usage for such vessels to stop at two ports in the island was held incompetent, because repugnant to the language of the contract.<sup>6</sup> In Alabama, where a policy stipulated that the risk on the goods was to commence "from and immediately following the loading thereof on board the sail-vessel or boat at New Orleans," it was ruled that usage could not render the insurer liable for a loss while on the wharf awaiting transportation, or while being carried overland by rail.<sup>7</sup> In *Hall v. Janson*,<sup>8</sup> which was an action on a policy of marine insurance in the ordinary form, in which the interest was declared to be "on money advanced on account of freight," and the court held that the interest was in the ship-owner, and that it became subject to a general average contribution, a plea stating a custom of London, where the policy was made,

<sup>1</sup> *Blackett v. Royal Exchange Assur. Co.*, 2 *Crompt. & J.* 244; *ante*, p. 413.

<sup>2</sup> *Crofts v. Marshall*, 7 *Car. & P.* 597; *Gabay v. Lloyd*, 3 *Barn. & Cress.* 793.

<sup>3</sup> *Bend v. Georgia Ins. Co.*, *Ang. on Ins.*, § 25.

<sup>4</sup> *Lewis v. Thatcher*, 15 *Mass.* 431.

<sup>5</sup> *Insurance Co. v. Wright*, 1 *Wall.* 456.

And see *King v. Enterprise Ins. Co.*, 45 *Ind.* 43.

<sup>6</sup> *Hearne v. Marine Ins. Co.*, 20 *Wall.* 488. And see *Seccomb v. Provincial Ins. Co.*, 10 *Allen*, 305.

<sup>7</sup> *Smith v. Mobile Nav., etc., Co.*, 30 *Ala.* 167. And see *Hare v. Barstow*, 8 *Jur.* 928; *Hall v. Janson*, 4 *El. & Bl.* 500.

<sup>8</sup> 4 *El. & Bl.* 500.

## Policies of Insurance.

that insurance upon "money advanced on account of freight" should not be liable for a general average was held bad, the custom alleged being inconsistent with the words of the policy.

Where a policy is issued covering a certain class of risks at a stipulated premium, a usage to abate a portion of it cannot affect the contract.<sup>1</sup> And so, to an action on a policy against a fire company for the amount of the loss insured by it, a custom of the company to contribute and pay on such policy only in proportion to what is paid on the same goods insured in another company is no defence.<sup>2</sup> Where a policy insured a wharf-boat "lying at the wharf at the city of Evansville, Indiana," it was not competent to prove a custom prevailing at Evansville of removing property of the character of that insured from that place to a neighboring ice-harbor, for safety during the season of running ice.<sup>3</sup> The words "free from average," having a certain and well-settled meaning, cannot be construed by the public or the officers of insurance companies as denoting something different from their general acceptance.<sup>4</sup> And evidence of commercial usage is not proper to show that a policy executed in blank is equivalent to a policy "for whom it may concern."<sup>5</sup> Where a policy obliges the insurer to pay the value of the net freight, a usage to pay two-thirds of the gross freight is bad.<sup>6</sup> In *Van Alstyne v. Aetna Insurance Company*,<sup>7</sup> the owner of a canal-boat procured a policy of insurance of the defendant on his boat for the sum of \$1,000, the policy providing that it should become void if any other insurance should be made upon the boat. Subsequently, he procured another policy to be issued upon the boat by another company. In a suit against the first company, they set up the condition as to "other insurance." It was held that evidence was not admissible to show an established custom to take out what is called a "trip-policy," whereby a party desiring to navigate his vessel beyond the points permitted in his yearly or time-policy takes out a policy for the particular trip he desires to make; that according to the custom the time-policy is suspended during the life of the trip-policy, and that such a policy is not considered as "other insurance" in the sense these words were used in the first policy — such a usage being in direct hostility to the express provisions of the contract. Where a marine-insurance company bound themselves to pay all damage to the property insured arising from "the perils of the sea," it was held incompetent for them to prove that, "by the established usage of trade in the port of New York and other ports, the master of the vessel is in all cases responsible for any damage sustained by the goods delivered by him to the owner or consignee, unless there has been an actual survey made on board the vessel by the wardens of the port or other officers, and on such survey the surveyors shall have found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that by a similar usage as between the assurers and the assured, the survey so made by the wardens is a document indispensable to be produced in order to charge the underwriters, and that the preliminary proof is deemed insufficient unless such document be

<sup>1</sup> *St. Nicholas Ins. Co. v. Mercantile Mutual Ins. Co.*, 5 Bosw. 238.

<sup>2</sup> *Lattomus v. Farmers' Mutual Ins. Co.*, 3 Houst. 254.

<sup>3</sup> *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549.

<sup>4</sup> *Bargett v. Orient Mutual Ins. Co.*, 3 Bosw. 385.

<sup>5</sup> *Turner v. Burrows*, 5 Wend. 541; *s. c.* 8 Wend. 144.

<sup>6</sup> *McGregor v. Insurance Co.*, 1 Wash. C. Ct. 39.

<sup>7</sup> 14 Hun, 360.

Landlord and Tenant—Contracts of Hiring.

established as part of it." Such a condition would, it was clear, have varied the legal obligations of the defendants as ascertained by the plain language of the policy.<sup>1</sup>

§ 209. **Same—Landlord and Tenant.**—The legal right of a landlord under an express contract for a time certain cannot be evaded by a custom.<sup>2</sup> And if a tenant should agree in his lease that the landlord was to have the waygoing crop, the custom of the country giving it to the tenant would not be allowed to prevail against the express contract.<sup>3</sup> Where parties agree to leave a mine "in good working order," a custom among miners to remove the pillars and supports is inadmissible.<sup>4</sup>

§ 210. **Same—Contracts of Hiring.**—Where a contract of hiring is for a term certain, a custom of the trade for the master or the servant to determine it at any time, without notice, is inadmissible to control the contract.<sup>5</sup> So, where a contract is entered into under which one is to work for another for one year at certain wages, a usage in the place by which either party may terminate contracts to labor for a given time at will, without assigning any cause for so doing, is incompetent.<sup>6</sup> Usage is not admissible to show that a stipulation in a contract of hiring that the hirer was to "lose the negro's lost time," related to time lost by sickness or running away, and not to time lost in consequence of his death.<sup>7</sup> So, where one hired from another a slave, stipulating that he should be employed in cutting cord-wood, "and for no other purpose," and while so employed he put him to assist in the removal of cord-wood in a boat and on rafts, whereby he was drowned, an offer to prove that "it was the custom, and considered part of the business of hands employed in cutting cord-wood on the Mississippi River, to save the wood by taking it to the highlands, when necessary, in boats," was rejected.<sup>8</sup> Where a cooper covenanted "to instruct, or cause to be instructed in the trade of a cooper," an apprentice indentured to him, a custom for coopers to send their apprentices on whaling voyages was held to be repugnant to the contract, and inadmissible.<sup>9</sup>

§ 211. **Same—Contracts for Work and Labor.**—A contract for ties to be supplied to a railroad company providing that the "ties will be finally inspected, and accepted or rejected, when being distributed on the road-bed in advance of the track," the following evidence was rejected as in conflict therewith, viz.:

<sup>1</sup> Rankin v. American Ins. Co., 1 Hall, 619.

<sup>2</sup> Werner v. Footman, 54 Ga. 128.

<sup>3</sup> Stultz v. Dickey, 5 Binn. 285.

<sup>4</sup> Randolph v. Holden, 44 Iowa, 327.

<sup>5</sup> Peters v. Stavely, 15 L. T. (N. S.) 151.

<sup>6</sup> Sweet v. Jenkins, 1 R. I. 147.

<sup>7</sup> "The words are plain and unambiguous. They have but one legitimate meaning, and it was not permissible to give to them a different meaning, either by direct or indirect proof, as was proposed in this case. If the contract had been silent on the subject of the negro's lost time, we do not say that the alleged local custom of Baldwin

County was not a legitimate subject of proof." Stone, J., in Barlow v. Lambert, 28 Ala. 704.

<sup>8</sup> "In the present case, the express stipulation in the contract restricting the service of the slave to cutting cord-wood alone, and excluding all other kinds of service, manifests the intention of the parties, in the language of the foregoing authorities, to exclude the operation of usage, and such evidence would be repugnant to and inconsistent with the written contract." McKinney, J., in Bedford v. Flowers, 7 Humph. 242.

<sup>9</sup> Randall v. Rotch, 12 Pick. 107.



## Contracts for Work and Labor.

That there was a general custom attending the construction of railroads, whereby the inspection and marking of ties constitute an acceptance by the company, notwithstanding the company reserved the right of finally accepting or rejecting any imperfect ties discovered when placing the ties on the road-bed in advance of the track.<sup>1</sup> And where a contract for the construction of a railroad fixed, as the price of grading, a certain rate per yard, and provided that no extras should be allowed, a custom to the contrary was irrelevant.<sup>2</sup> Where a contract requires that a party should "clear, grub, and pile the brush" on all of a certain piece of land, evidence that it was not usual in the neighborhood to "grub" such lands, or that a farm would be better without having them grubbed, is inadmissible.<sup>3</sup> So, where the contract was to "clear" a tract of land, a usage to affect the ordinary signification of the word was rejected. And where a party agreed to dig a ditch "two feet deep and eighteen inches wide at the bottom," evidence of the custom of the country as to digging ditches was held incompetent.<sup>4</sup>

1. When stone-cutters agreed in writing with the defendant to furnish stone for his building according to the plans and specifications of an architect, and to do all the fitting and rebating necessary. Wooden patterns were necessary to cut the stone according to the plans, and these the stone-cutters procured and paid for, and sued the defendant for their cost, in which action it was held that evidence of a usage for stone-cutters, in cutting stone for a building, to procure such patterns, and recover the cost from the owner, was inadmissible. The patterns were not to be paid for by the defendant, by the express terms of the contract, but the plaintiffs were impliedly bound to provide them, as they were to provide all other necessary tools.<sup>5</sup> Where, in a contract for building a house, the defendant agreed to pay "\$8 per thousand for each thousand brick which may be laid," it was not competent to show that by the usage of the trade it was customary to compute the contents of walls having doors, windows, and other openings as if they were solid.<sup>6</sup> So, where P. covenanted to pay B. "\$7 per thousand for making and laying brick, counting the neat brick in the building," and B. was permitted to introduce witnesses who testified that "the rule known and established among masons for measuring their work and ascertaining the number of neat brick in a building was to ascertain the number of cubic feet by multiplying the aggregate length of the walls from out to out by the height of the story, and that product by the thickness of the wall (which would give the cubic feet in the wall), counting the corners twice, and then by multiplying the number of cubic feet thus ascertained by twenty-two and a half, the product would be the number of neat brick," the case was reversed for error.

<sup>1</sup> *Smyth v. Ward*, 46 Iowa, 339.

<sup>2</sup> *Phillips v. Starr*, 26 Iowa, 349.

<sup>3</sup> "The court below erred in admitting evidence showing that it was not usual to grub ravines such as this, and that it was thought to be better for the farm not to have them grubbed. Holmes had a right to contract to have the whole land grubbed, as he did. Whether it was a matter of utility, in his judgment, or of mere taste, it was his privilege to differ with others on that subject \* \* \* The fact that he had

made a contract to have that portion of the land grubbed showed that he chose to differ with those who thought it better not to have it done, and refuted in advance any inference to be drawn from the opinions of others as to his views and wishes." *Caton, J.*, in *Holmes v. Samuel*, 15 Ill. 413.

<sup>4</sup> *Harper v. Pound*, 10 Ind. 32.

<sup>5</sup> *Harvey v. Cady*, 3 Mich. 431.

<sup>6</sup> *Davis v. Galloupe*, 111 Mass. 121.

<sup>7</sup> *Kendall v. Russell*, 5 Dana, 501.



Agreements for Work and Labor.

"The covenant," said the court, "is to be construed according to the plain and obvious meaning of the terms used by the community at large, and not according to their terms as used among brick-masons."<sup>1</sup> Where A. agreed to haul to his mill and saw into boards certain mill-logs belonging to B., for which service he was to receive "one-third of the stuff after sawing," it was held that a usage of the mill to retain the slabs as part of the compensation for sawing was inadmissible.<sup>2</sup> And where a contract required a party to win stones, etc., "for the purpose of building," it was held that evidence of usage was not admissible to explain the sense in which the word "building" was used.<sup>3</sup> A contract in writing to keep and return certain sheep cannot be shown by usage to have been intended to be a contract to return an equal number of sheep of a like quality.<sup>4</sup>

A printing and publishing company entered into a contract with the city of Detroit to do its printing at eighty-six per cent below the rates fixed by the statutes of Michigan for the publication of legal notices, a clause in the contract providing that "no constructive charges whatever are to be made for printing, publishing, or furnishing material." Under this contract the company published the list of tax-sales, known among printers as "figure-work." According to a custom among printers, double measure was allowed for such work in the payment of employees and in charges to customers. During the time of such publication, the manager of the company, on discovering such fact and ascertaining the custom, went to the city comptroller and informed him that the company would make a claim against the city for double measurement. It was held that the custom could not entitle the company to double measurement, the terms of the contract being conclusive on this point.<sup>5</sup> In another case, by the terms of a contract entered into by the plaintiff with the city of New York for the construction of a sewer, the contractor was not to be entitled to demand or receive any payment for any portion of the work to be done or materials furnished "until the same should be fully completed, and the assessment to be levied thereon duly confirmed." It was further provided in the contract that advances might be made in conformity with a city ordinance which allowed seventy per cent to be paid on certificate, the remaining thirty per cent to be reserved until the final completion of the contract, but required that interest on such advances should be charged from the time of making them up to the time of final payment. The court held that interest should be charged on the advances up to the time of the confirmation of the assessment, and refused to hear evidence of a custom of the defendant city, through its departments, to charge interest only up to the time of the completion of the work, and not until the confirmation of the assessment.<sup>6</sup>

A joint undertaking to build a vessel cannot be affected by a custom of the place for persons engaged in building vessels each to be responsible only for his own share.<sup>7</sup> And on a contract to pay an architect ten per cent commission for building a house, evidence of the customary commissions for building such houses is irrelevant.<sup>8</sup>

<sup>1</sup> *Pavey v. Burch*, 3 Mo. 314.

<sup>2</sup> *George v. Bartlett*, 22 N. H. 408.

<sup>3</sup> *Charlton v. Gibson*, 1 Car. & Kir. 541.

<sup>4</sup> *Wheeler v. Nurse*, 20 N. H. 220.

<sup>5</sup> *Detroit Advertiser*, etc., *Co. v. City of*

*Detroit* (Sup. Ct. Mich., April, 1880).

<sup>6</sup> *Fellows v. Mayor of New York*, 17 Hun, 249.

<sup>7</sup> *Ripley v. Crooker*, 47 Me. 370.

<sup>8</sup> *Loneragan v. Courtney*, 75 Ill. 580.

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Contracts between Principal and Agent.

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§ 212. **Same — Principal and Agent.** — And evidence of a usage is not admissible where an agent's contract is clear and unambiguous. In a Missouri case,<sup>1</sup> suit was brought on a contract to recover a balance claimed to be due under it. The defendant had contracted to pay the plaintiff "twenty per cent upon all original or first-year premiums collected and paid in by him upon policies issued upon applications taken" by him. On the trial, the plaintiff offered evidence to show that it was the established "usage, custom, and method of doing business by the insurance company, in regard to such policies as were referred to in the contract, to treat all premiums as collected, though, for the convenience of the assured, payable in instalments." The court excluded the evidence, which action, on appeal, was affirmed. CURRIER, J., said: "According to the obvious reading of this stipulation, it is clear that it secured commissions to the plaintiff alone upon moneys actually collected and paid in by him. His right to the commission is made dependent upon an actual collection and payment. That this is the true construction of the contract upon its face is not disputed. \* \* \* It was offered to be shown, in the way of explaining the contract, that the insurance company concerned in these policies and premiums, upon the acceptance of an application and the issue thereon of a policy, was accustomed to credit the soliciting agent's commissions at once, although the premium for the first year, upon which the commission was allowed, was not then paid, and was payable by instalments at future dates. \* \* \* The defendant agreed to pay the plaintiff a commission on all moneys which the plaintiff should collect and pay over. There is nothing here for a construction. The plaintiff is simply suing to recover commissions on money which he did not collect and pay over, and seeks, by the aid of a construction founded on usage, to so enlarge the scope of the stipulation as to include commissions on all original premiums, whether collected and paid over or not. The parties might have so contracted, but did not. The usage must yield to the express stipulations contained in the written agreement." The Missouri agent of a Connecticut life-insurance company having inquired of the company concerning the terms on which he was employed, received the following answer from them: "Concerning your *status* in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay." In consequence of subsequent disputes, the agent was soon after discharged by the company, there being at the time the sum of \$1,772 in his hands, which they claimed. The agent brought suit for his commission, and on the trial offered to prove by men familiar with the business of life insurance that the words of the letter had a peculiar and well-understood meaning among insurance men; that its meaning, as understood in that business, was that the agent should have the right to solicit and cause policies to be issued according to the published rules and rates of the company, and should have the right, during the life and force of such policies, to collect all renewed premiums thereon, and have commissions on such renewals; and that if he was discharged by the company without sufficient cause, he was entitled to be paid immediately the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies. The trial judge excluded the evidence, and in the Supreme Court of the United States, where the case was taken, his ruling was affirmed. "It

<sup>1</sup> Kimball v. Brawner, 47 Mo. 398.

Principal and Agent.

appears to us, as it did to the Circuit Court," said Mr. Justice MILLER, "that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage, to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties, differing materially from the written one under which they had both acted for some time."<sup>1</sup> Where the contract of an agent with an insurance company provided that certain specified commissions should be "as compensation in full for any and all services under this agreement," a custom in the insurance business giving the agent commissions on the renewal premiums on policies obtained by him was rejected.<sup>2</sup>

By a written contract, commission merchants agreed that they would receive goods consigned to them, and insure and sell them in accordance with provisions contained therein, "and charge on all such sales a commission of 6½ per cent, \* \* \* which charge shall include commission, labor, cartage, insurance, \* \* \* and every expense whatever." At the termination of the contract some of the goods remained unsold, and at the request of the consignees, and with the consent of the consignors, were transferred to other commission merchants. The first commission merchant sought by usage to recover one-half commissions on the latter goods, but the usage was rejected as repugnant to the express agreement.<sup>3</sup> In an action to recover damages for breach of orders, on the sale of an invoice of molasses consigned by the plaintiff to the defendant, it appeared that the plaintiff wrote to the defendant, enclosing the invoice and bill of lading of the goods, and saying: "On the arrival of this cargo, unless a fair profit can be realized on landing, please have the hoops drove, and put it into a good store, with the hope of sending a further cargo." The defendants sold the goods at a loss, and on the trial the court rejected evidence of a custom of the port, which the defendant offered, justifying their action under the circumstances. The jury found for the plaintiff, and the judgment was affirmed on appeal. "If a usage," said ROGERS, J., "be certain, uniform, ancient, and reasonable, it incorporates itself into the contract. But as this is a suit for a breach of an order, plain, positive, and free from ambiguity, I cannot understand what the usage of those cities has to do with the matter in controversy. If the plaintiff failed to prove a breach of orders, there was an end of his case. If he succeeded in proving instructions binding on the defendants, and the breach of them, it admits not of control by reason of any custom whatever. The agreement of the parties constitutes the law of the contract."<sup>4</sup>

§ 213. *Same — Bankers and Brokers — Bills and Notes.* — In *Allen v. Dykers*,<sup>5</sup> the action was upon a promissory note in these words: —

"\$21,000.

NEW YORK, January 19, 1839.

"Sixty days after date, I promise to pay to Dykers and Alstyne, or order,

<sup>1</sup> *Partridge v. Insurance Co.*, 15 Wall. 575.

And see *Stagg v. Insurance Co.*, 10 Wall. 589.

<sup>2</sup> *Castleman v. Southern Mutual Ins. Co.*,

14 Bush, 197.

<sup>3</sup> *Ware v. Hayward Rubber Co.*, 3 Allen, 84.

<sup>4</sup> *Porter v. Patterson*, 15 Pa. St. 230.

<sup>5</sup> 3 Hill, 593 (affirmed in *Dykers v. Allen*, 7 Hill, 497).

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Bankers and Brokers — Bills and Notes.

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twenty-one thousand dollars, for value received, with interest at the rate of seven per cent per annum; having deposited with them as collateral security, with authority to sell the same on the non-performance of this promise, two hundred and fifty shares North American Trust and Banking Company stock. Sale to be made at the board of brokers. Notice waived if not paid at maturity.

“WM. PAXSON HALLETT.”

This note was given by the plaintiff for a loan of \$21,000, and was executed by his agent. He claimed, in the action, to recover the difference between the value of the stock and the money loaned, on the ground that the defendants had sold the stock before the money became due. The latter offered to prove that where stock was deposited with a broker as collateral security, it was the general usage of brokers for the latter to hypothecate or dispose of it at pleasure, and on payment or tender of the principal debt, to return an equal number of shares of the same kind of stock. The rejection of this evidence was held proper on appeal. Said NELSON, C. J.: “It is not pretended that a pledgee, as such, has a right to dispose of the pledge before the pledgeor fails to comply with his engagement; on the contrary, it is conceded that such right, if it exists at all, must be conferred by an express or implied agreement. In this case, as the agreement between the parties was in writing, the question as to the defendant's right to sell the stock before the note became due must be determined, as in other cases depending upon the construction of written instruments, by consulting the terms and provisions of the agreement, and thus endeavoring to ascertain the understanding and intent of the parties. Bringing the question down to this test, and assuming that the parties expressed, and intended to express, their mutual understanding of the terms upon which the loan was made, it seems to me impossible to raise a doubt upon the true meaning and character of the transaction. The plaintiff applies to the defendants to borrow \$21,000 for sixty days, offering as collateral security the two hundred and fifty shares of stock in question. The defendants agree to the proposition, advance the money, and take a note for the amount, stating therein the deposit of the stock, and that the defendants are authorized to sell the same on non-payment of the loan. The note contains no consent, express or implied, that the defendants may sell or dispose of the stock before the loan becomes due. On the contrary, it contains a strong implied prohibition against selling except in a single event, viz.: non-payment of the money at the date specified. There is not only no authority to sell before the happening of the event, — which of itself is enough to refute the pretension of the defendants, and subject them to the consequences of a breach of trust, — but, having provided for the sale at a given period and on a specified condition, all idea of authorizing one previous to that time is necessarily negatived, upon the familiar maxim, *Expressio unius est exclusio alterius*. The defendants being stockholders and dealers in stock, their counsel offered to prove on the trial that it was the usage, when stock was transferred to such dealers by way of collateral security, not to hold it specifically, but to transfer it, by hypothecation or otherwise, at pleasure, and on payment or tender of the money advanced, to return an equal quantity of the same kind of stock; also, that this usage was general, and known to the agent who made the loan in question. The object of the offer was to lay the foundation for insisting that the usage should be regarded as incorporated in, and forming part and parcel of the

Bankers and Brokers—Vendor and Purchaser.

agreement; thus making the latter import a consent on the part of the plaintiff that the defendants might use the stock during the running of the loan, the same as if they were the absolute owners. It is not necessary to determine what effect would be due to such proof in the case of a simple pledge as collateral security, without any further agreement. Possibly the known usage in like cases might be considered as attaching itself to the transaction and constituting a part of it. But when the parties have chosen to prescribe for themselves the terms and conditions of the loan, they must be held to abide by them; and we are especially bound to refuse effect to any general or particular usage when in direct contradiction to the fair and legal import of a written contract."

In *Lombardo v. Case*,<sup>1</sup> Case had executed the following contract:—

"NEW YORK, October 8, 1863.

"For value received, the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburg Railroad Company, at one hundred and seventeen (117) per cent, any time in six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time, to half-past one P. M. each day.

"WATSON E. CASE."

It appeared that at the time of the making of this contract a dividend of four per cent had been declared and announced, and that the stock was selling "dividend on." The plaintiff had demanded this dividend from the defendant, but it had been refused, and the action was instituted therefor. He offered to prove that by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends," in the contract, were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on," and not "ex dividend." The evidence was ruled to be inadmissible. "'Six months after date' cannot," remarked SUTHERLAND, J., "by proof of any custom, be extended, or explained to mean or include 'a day or two before date.'" It has been held, too, that in an action against the drawer of a bill of exchange drawn and indorsed in England and payable abroad, and dishonored, evidence is not admissible to prove a usage among merchants here to entitle the holder, at his option, to demand from the drawer the amount of reëchange, or the sum which he gave for the purchase of the bill, this being a usage which in terms contradicts the written instrument.<sup>2</sup>

§ 214. Same—Vendor and Purchaser.—*Yates v. Pym*,<sup>3</sup> decided by the English Court of Common Pleas in 1816, is in conflict with many later cases as to the admissibility of usage to show the trade meaning of terms in written contracts. It was an action on a sale note of "prime singed bacon," and evidence was offered, and rejected, of a usage in the bacon trade that a certain latitude of deterioration, called "average taint," was allowed before the bacon ceased to answer the description of prime bacon. Other cases are equally irreconcilable with many of the decisions contained in previous chapters of this work. A contract for the sale of hogs was in the following terms: "Muscatine, February

<sup>1</sup> 45 Barb. 95.

<sup>2</sup> 6 Taun. 445.

<sup>3</sup> *Yates v. Pym*, 5 C. B. (N. S.) 533.

Criticism of *Cash v. Hinkle*.

28, 1868. — I have this day sold to H. Willmering fifty good hogs at \$6.50 per hundred pounds, average to be two hundred and fifty pounds, delivered at Washington, Iowa, at said H. Willmering's option, by giving ten days' notice, at any time in December. Paid on contract, \$50; balance to be paid on delivery of hogs." The plaintiff sued the defendant for not delivering the hogs. The defendant pleaded that the plaintiff never gave the notice required by the contract. On the trial, the plaintiff offered to show that it was customary among dealers in hogs, under such contracts, "if the buyer did not declare his option, or fix the time when the stock was to be delivered, then the seller was understood as contracting that the stock should be delivered upon the last day fixed, or, as in this case, upon the last days of the month named; and defendant thus understood the contract." But this evidence was held properly excluded, as contradicting its words.<sup>1</sup> A contract like the last called for "sixty-five head of fat hogs, to weigh two hundred and twenty-five pounds and over." The plaintiff had tendered certain hogs, which it was shown did not weigh two hundred and twenty-five pounds each, and, in an action for refusing to receive, he was permitted to show that by the custom of the trade the language of the contract was understood to mean that the hogs should average two hundred and twenty-five pounds. On appeal, the Supreme Court construed the contract as calling for sixty-five head weighing each two hundred and twenty-five pounds, and reversed the case for the admission of the evidence of custom.<sup>2</sup> This case certainly falls very near the line which divides the cases in which evidence of a usage of trade is admissible to interpret a contract, from those in which it is inadmissible to alter it. It is a close case, but, in the opinion of the writer, the evidence offered was properly admitted below. MILLER, J., who delivered the judgment of the majority of the Supreme Court, cites but one case (an Iowa one) in support of his position, and gives no evidence that he had examined the question in the light of the English and American adjudications. He advances no reason for his conclusion except that, to his mind, the contract was plain, and free from all ambiguity. "There is simply," he says, "an omission of a word to express whether the weight specified is the weight of each hog or the aggregate weight of all the hogs. It is very clear that the former was intended, and that the word 'each' is to be implied." But if it was the custom of the trade, when buying and selling a lot of hogs over a certain weight, to receive or deliver hogs aggregating that weight throughout, though some fell under and some went over, it is clear that the contract would purposely omit to specify what the court here thought was accidentally omitted. The understanding of the trade as to what the contract really meant was more likely to be correct than the unaided opinion of a bench of lawyers. Of this belief was the chief justice, who dissented from the ruling of the majority, and who did not fail to give reasons for his dissent. "Contracts," said BECK, C. J., "must be construed with reference to customs prevailing in regard to their subjects; and while the express terms of a contract may not be changed or modified by parol evidence, yet the meaning of its words may be explained and applied thereby to their proper objects. A custom cannot be set up against the clear intention of the parties to a contract as expressed therein, but the words of a contract must be construed in reference to a custom affecting the

<sup>1</sup> *Willmering v. McGaughey*, 30 Iowa, 205.<sup>2</sup> *Cash v. Hinkle*, 38 Iowa, 622.



## Vendor and Purchaser.

subject, and known to the parties, that the true intention may be ascertained. In the contract before us, the parties agree that the hogs sold are 'to weigh two hundred and twenty-five pounds.' Now, the custom in question does not change the import of the words. It simply applies to them a meaning. The language of the contract is not explicit, and is left by the parties to interpretation. Its meaning, whether each hog, or the average of all the hogs, must be two hundred and twenty-five pounds in weight, may well be ascertained by proof of a custom governing the trade, in view of which the law presumes the parties contracted."

In *Beals v. Terry*,<sup>1</sup> the contract was in these words:—

"For value received, we have this day sold, and agree to deliver to Messrs. Roderick Terry & Co., in the city of New York, two thousand barrels superfine flour, 'City Mills, Rochester,' at six dollars per barrel, payable cash on delivery of each parcel, to be delivered at our option in all the month of June next, in parcels of not less than two hundred barrels each. Any variation from superfine to be settled at the usual rates of difference.

"CLARK & COLEMAN.

"NEW YORK, March 26, 1847."

The defendants being unable to deliver the flour specified when called for, and an action being brought upon the contract, they offered to prove that by the usage of the trade in flour in New York city it was customary, on contracts for the delivery of particular brands of flour at a future day, to deliver other brands of equal quality in fulfilment of such contracts. This evidence was held to be properly excluded. "We cannot recognize a usage," said VANDERPOEL, J., "which will authorize a party to deliver one article in fulfilment of a contract positively to deliver another—which will justify him in delivering the fabrics of one mill or manufactory when he has expressly contracted to deliver those of another. The injustice of such a rule is rendered manifest by the evidence in this case. It is proved that when the supply of flour is small, a particular brand will often maintain its price in the face of a general fall of \$1 a barrel. Suffice it to say, that one of the contracting parties wants a particular brand, and the other agrees to deliver it to him; and it is not in law or sound reason a good answer for the vendor to say, 'I offered you, not the article I contracted to deliver, but one just as good.' The vendee may, at the time of the contract, have the most conclusive reasons for contracting for that particular brand, and we cannot on any sound principle hold the contract satisfied by the tender of another, which the witnesses may deem equally good." In an early Missouri case,<sup>2</sup> the plaintiffs had made their bond to defendants for \$12,000, conditioned that if they should by the 1st of April, 1808, pay \$6,000, payable in shaved deer-skins, at forty cents to the pound, then the bond to be void. On this bond judgment was obtained for \$6,000 and interest. The plaintiffs then filed a bill in chancery asking to be relieved from a portion of the judgment. They alleged that in the year 1806 shaved deer-skins at forty cents per pound were only worth thirty-three and one-third cents in money; or, in other words, that a peltry dollar was in value two and one-half pounds of skins, and that a silver dollar was equal to three pounds of deer-skins, making a difference of one-sixth; that by the custom of the country a contract like the present was understood and taken to be a peltry contract, and that the sum of \$6,000, being mentioned, was

<sup>1</sup> 2 Sandf. 127.

<sup>2</sup> *Clamorgan v. Guisse*, 1 Mo. 92.



## Vendor and Purchaser.

to be understood as a means for ascertaining the number of pounds of deer-skins to be paid, when taken in connection with the price of the pound being fixed at forty cents. They therefore insisted that, as in April, 1808, deer-skins had fallen to twenty cents per pound, and that, as fifteen thousand pounds of deer-skins was the real thing contracted for, twenty cents per pound on that amount should be the measure of damages. But the court refused the relief asked, saying: "It was proved that the custom set up did prevail, but whether that custom had the force of law or not does not appear; nor does it appear that any such custom was in the mind of the parties at the time of making this contract. Then, unless this custom amounted to law, it could have no effect on this contract; and at all events this mode of expounding contracts by parol evidence of the understanding of some is extremely dangerous, and by law is not admissible. The contract must be expounded from its face, and by the law of the land here. Then, looking at the instrument, and comparing it by the rules of law, the parties have liquidated their own damages to \$6,000, which \$6,000 is dischargeable, if the party chooses, by the payment of fifteen thousand pounds weight of deer-skins. If these deer-skins are not paid, the debt nevertheless remains fixed at \$6,000. This, we are of opinion, is the true and lawful construction of this instrument; so that we cannot perceive injustice has been done by the defendants in chancery in requiring payment to that amount." It is held in Illinois that the phrase "current funds," in a note, cannot be explained by usage, as its meaning is settled.<sup>1</sup>

Where W. contracted with R. for the sale of salt, as follows: "Sold J. H. Rogers one thousand sacks coarse Liverpool and two thousand sacks fine Liverpool salt, at \$2.10 per sack, to arrive by the 15th of November," evidence that by the custom of merchants, the words "to arrive by the 15th of November" meant "deliverable on or before the 15th of November," was held inadmissible.<sup>2</sup> A usage that the sale of hides was subject to the approval of the purchaser, or of an inspector, was held repugnant to the following contract in a broker's book, and therefore inadmissible: "Boston, September 9, 1865. — Sold William B. Spooner & Co., account B. G. Boardman, 5 bales D. G. cowhides, 1 bale dry do. at 17c per lb., net cash, delivered in N. Y."<sup>3</sup> So, where there was a written contract to deliver certain quantities of flour at a certain price at a named place, on seller's option, proof of a usage in the market to demand margins of the seller as security for the delivery was held inadmissible. "There is no ambiguity or uncertainty in its terms or stipulations," said Mr. Justice NELSON, "and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of \$9.25 per barrel, in consideration of which the defendants agree to receive the flour and pay the price. This is the substance of the written contract. But the defendants insist that besides the obligations arising out of the written instrument the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance, and this by the deposit in bank of the sum of \$5,000. The written instrument bound only the personal responsibility of the plaintiff; the

<sup>1</sup> Moore v. Morris, 20 Ill. 255; Galena Ins. Co. v. Kupfer, 28 Ill. 332; Marc v. Kupfer, 34 Ill. 286; Osgood v. McConnell, 32 Ill. 74.

<sup>2</sup> Rogers v. Woodruff, 30 Ohio St. 632.  
<sup>3</sup> Boardman v. Spooner, 13 Allen, 353.

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parol evidence seeks to superadd, not a responsible name as a surety, but in effect the same thing—a given sum of money. The parol proof not only adds to a written instrument, but is repugnant to the legal effect of it.”<sup>1</sup> So, where the defendant, by a written contract, agreed to sell the plaintiff “sixty tons of Ware potatoes at £5 a ton,” it was held inadmissible to show that a particular kind of Ware potatoes was meant by the plaintiff.<sup>2</sup> Where a memorandum of a contract was as follows: “Of E. Y., 39 pockets Sussex hops, Springetts; 5 pockets Kenwards. 78s. Springetts to wait orders,” it was held that evidence of custom was inadmissible to show that the sale was on a credit of six months.<sup>3</sup> Under a written contract to deliver wool “in good order,” a custom which would relieve the vendor from the obligation is inadmissible.<sup>4</sup>

By the terms of a contract between A. and B. for the purchase, killing, and packing of hogs, it was agreed, among other things, that the hogs were to be killed and packed by B. “on joint account, each party to have one-half interest.” It was held that evidence of a custom of the trade that when, under such a contract, the packers themselves slaughtered the hogs, they were entitled, to the exclusion of the other contracting party, to the profits on the sale of the bristles, gut, fat, and grease from the hogs packed, was inadmissible, as being in direct conflict with the express terms of the contract.<sup>5</sup> A contract for the purchase of “one hundred thousand oranges, more or less, at the rate of \$72 per thousand, to be delivered to us boxed, in good order,” cannot be affected by a custom of orange-dealers to require a larger and better fruit than that delivered in the particular case.<sup>6</sup> Where a contract calls for a specific parcel or lot, described as being of a certain quantity, “more or less,” evidence of a usage to limit the words “more or less” to a certain percentage is not admissible.<sup>7</sup> In an early English case,<sup>8</sup> evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for three hundred *quarters (more or less) of foreign rye*, could not, consistently with the usage of trade, be required to receive so large an excess as forty-five quarters over three hundred. The question as to the admissibility of the evidence was ultimately withdrawn from the attention of the court; but LITLEDALE, J., remarked that where words were of such general import, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning. Under a contract to sell “one hundred shares of stock,” a custom that something more passes to the purchaser is invalid; and where A. contracted to sell to B. “two flocks of sheep, except two bucks and a lame ewe,” at a certain price, a custom that the wool of sheep does not go to the purchaser was excluded.<sup>10</sup>

The plaintiff delivered at the defendant’s elevator a quantity of corn, and received the following instrument:—

“CASS COUNTY MILL AND ELEVATOR CO., January 5, 1875.

“Received in store of C. R. Marks, one load of corn, subject to storage.  
Number of bushels, 2,920.  
NORTON, T.”

<sup>1</sup> Oelricks v. Ford, 23 How. 49.

<sup>2</sup> Smith v. Jeffries, 15 Mee. & W. 561.

<sup>3</sup> Ford v. Yates, 2 Man. & G. 549; 2 Scott N. R. 645. But see Lockett v. Nicklin, 2 Exch. 95.

<sup>4</sup> Polhemus v. Helman, 50 Cal. 438.

<sup>5</sup> Atkinson v. Allen, 29 Ind. 375.

<sup>6</sup> Corwin v. Patch, 4 Cal. 204.

<sup>7</sup> Vail v. Rice, 5 N. Y. 155. And see Cabot v. Winsor, 1 Allen, 546; Brawley v. United States, 96 U. S. 168.

<sup>8</sup> Cross v. Englin, 2 Barn. & Adol. 100.

<sup>9</sup> Spear v. Hart, 3 Robt. 420.

<sup>10</sup> Groat v. Gile, 30 Iowa, 451.

## Miscellaneous Contracts.

The grain being destroyed the next night while in the elevator, the plaintiff sued to recover its value, on the ground that the corn was sold to the defendants, and that the transaction, as exhibited by the above writing, under a custom of the place where they were doing business, amounted to a purchase at the market price of the grain, when the plaintiff should demand payment. But it was ruled that such a custom was inconsistent with the language of the instrument, and could not prevail.<sup>1</sup>

Where a Pennsylvania merchant wrote to a customer in Virginia, calling his attention to the fact that an account was overdue, adding, "We must request you to remit the amount," it was held that a usage in the former State that such instruction implied that the remittance was to be at the risk of the creditor, was inadmissible.<sup>2</sup> Where a contract for the sale of oats provides for their delivery on the cars at the place of shipment, proof of a custom that the place of delivery and payment is the place of destination is inadmissible.<sup>3</sup> And where a contract was made for the sale of a horse, the horse delivered, and a note for the price given, evidence that it was the custom in selling horses to give the purchaser time to try the animal before the sale was final, was rejected.<sup>4</sup>

§ 215. *Same* — *Miscellaneous*. — R., a carriage-builder, rented to M., by the year, a gig, under a written agreement providing that R. was "to keep the gig in perfect repair, and to put new linings and new wheels once every twelve months, so long as M. should choose to keep it, at the rate of eighteen guineas a year, without any further charges whatever." The gig, while in M.'s possession under this agreement, was injured through the negligent driving of a third person, one shaft being broken, and it was thereupon sent to R.'s factory to be repaired. R. subsequently brought an action against M. for the cost of these repairs and the loan of another gig while the damaged one was under repair; R. proved the usage in the trade to be that when a carriage was let out on hire for a year, the lender was only to keep it in repair so far as repairs might become necessary by ordinary wear and tear, but if they became necessary from the carriage sustaining any unusual injury, the hirer was entitled to charge therefor, and also for the hire of another carriage to take its place. Lord DENMAN ruled that the agreement subjected R. to the expense of repairs, although necessary in consequence of an accident happening to the gig, and that, the language of the agreement being clear and unequivocal, evidence as to the general usage of the trade was irrelevant.<sup>5</sup> So, if a bailee makes a special contract, that must be looked to in determining his liability, and evidence of usage is irrelevant.<sup>6</sup>

A party executed a guaranty of "the payments of all flour consigned by the said W. to the said H. for sale." This, it was held, would not cover a sale to the consignee of the flour remaining unsold upon closing the account between the consignor and himself, and could not be controlled by evidence of a custom among commission merchants to purchase goods remaining unsold under such circumstances, and to treat such a transaction as a sale to a third person.<sup>7</sup>

<sup>1</sup> *Marks v. Cass Elevator Co.*, 43 Iowa, 146.

<sup>2</sup> *Gross v. Oriss*, 3 Gratt. 282.

<sup>3</sup> *Duncan v. Green*, 43 Iowa, 678.

<sup>4</sup> *Schenck v. Griffin*, 38 N. J. L. 462.

<sup>5</sup> *Reading v. Menham*, 1 Moo. & R. 334.

<sup>6</sup> *Goodfellow v. Meegan*, 32 Mo. 280.

<sup>7</sup> *Carkin v. Savory*, 14 Gray, 523.

## General Rules.

Where it is the condition of a teller's bond "faithfully to perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness and want of care," the usage of other banks requiring of tellers only reasonable care and diligence is irrelevant.<sup>1</sup>

The custom of an innkeeper to deposit baggage in the guest's bed-room does not affect a case where the guest has ordered it to be placed in the commercial room.<sup>2</sup> Where there is an express agreement between a landlord and a guest that absences shall be deducted from the charges for board, that it is the custom of hotels not to allow such deductions is irrelevant.<sup>3</sup>

Where a written contract provided that certain work should be "measured by the city engineer," the usage in the city engineer's office for his assistants to attend to such work was held to be irrelevant.<sup>4</sup>

§ 216. *The Effect of Statutes on Usages and Customs.*—Statutes (acts of the legislature) may be regarded as the results of custom, as recognitions of the practices of the community, and as the worded outcome of observance.<sup>5</sup> A custom or usage, then, which if admitted would contradict the commands of a statute, ought to be rejected for two reasons: First, because it is a violation of the written law, which is made to be followed, and not evaded or disobeyed; and, second, because any other rule would be to recognize inconsistent customs, which, as we have seen, is never done.<sup>6</sup> Said JAMES, V. C., in an English case: "This is a custom which tends to alter the character of the interests in land belonging, respectively, to the plaintiffs and defendants, there being express legislation that every interest in land shall be created by writing. No doubt this court has in several cases found means to avoid or evade that rule of the legislature. I apprehend, however, that that is not a thing to be extended. It appears to me to be the duty of every court, whether a court of equity or a court of law, to give effect to the plain meaning of the legislature, whatever may be the views entertained of its policy or applicability in particular cases. I, therefore, should be very slow to extend anything by which interests in land can be created, affected, or altered by parol, or by any supposed convention existing by the understanding of the parties."<sup>7</sup> A custom or usage repugnant to a statutory enactment is, therefore, void.<sup>8</sup>

<sup>1</sup> *Union Bank v. Forrest*, 3 Cranch C. Ct. 218.

<sup>2</sup> *Richmond v. Smith*, 8 Barn. & Cress. 9.

<sup>3</sup> *Stebbins v. Brown*, 65 Barb. 274.

<sup>4</sup> "The words 'city engineer,' in a contract," said the court, "are merely *descriptive personae*. His duties in regard to measurement were precisely what those of any other engineer would have been, if another had been agreed upon. He had no power of substitution. And although the performance of the work undoubtedly required the aid of servants, they must have acted under his direct personal supervision, and he must

have had personal knowledge of what was done." *Palmer v. Clark*, 106 Mass. 373.

<sup>5</sup> *Ante*, Chap. I., § 1; *Browne on Usages & Customs*, 27.

<sup>6</sup> *Ante*, Chap. I., § 12.

<sup>7</sup> *Daun v. City of London Brewery Co., L. R.* 8 Eq. 155.

<sup>8</sup> *Winter v. United States*, Hempst. 344; *The Lucy Anne*, 13 Law Rep. (N. S.) 545; *Love v. Hinckley*, Abb. Adm. 435; *Maury v. Beckman*, 9 Paige, 188; *Hall v. Reed*, 2 Barb. Ch. 500; *Coleman v. McMurdo*, 5 Rand. 51. But see *Governor v. Withers*, 5 Cratt. 24; *Brown v. Farrar*, 3 Ohio, 155; *Mosier v. Harmon*, 29 Ohio St. 220.

## Acts of Parliament—Contrary Usages.

## § 217. Words defined by Act of Parliament—Contrary Usages void.—

It follows that the admissibility of the evidence of custom to explain the meaning of a word used in any contract whatever, is subject to the qualification that if a statute has given a definite meaning to any particular word, it must be understood to have been used with that meaning, and no evidence of custom will be admitted to attach any other meaning to it. Thus, by statute, words denoting weights, measures, and numbers have frequently been defined. Therefore, in one case, "bushels" was held to mean only statute bushels.<sup>1</sup> In another, "quarters of corn" was understood to mean legal quarters.<sup>2</sup> In *Hughes v. Humphreys*,<sup>3</sup> the statute 5 & 6 Wm. IV., st. 6, c. 63, which abolishes in England all local or customary measures, and imposes a penalty on every person who shall sell by any denomination or measure other than one of the imperial measures, or some multiple or aliquot part thereof, was held to apply only to the sale by measure of capacity, and not to sale by weight estimated in pounds; and that, therefore, it did not extend to sale by any local term designating a given number of pounds' weight. As to sale of wheat by Welsh "hobbett," it appeared by evidence that this designated one hundred and sixty-eight pounds weight, and that a sale by "hobbett" entitled the purchaser to so many pounds of wheat. And in another case, a contract for the sale of a certain number of tons of iron, "long weight," was held not to be a contravention of the statute, and that consequently such a contract was valid. It appeared in that case that the fifteenth section of 5 Geo. IV., c. 74, was not repealed by the act alluded to, and that, therefore, contracts by local weight might be lawfully made if the proportion to the standard was expressed.<sup>4</sup> Thus, in the leading case of *Noble v. Durell*,<sup>5</sup> it was held by the Court of King's Bench that where a statute declared that every pound of butter should weigh sixteen ounces, a custom that they should weigh eighteen ounces was bad. So, where a statute of Missouri provided, "The hundred-weight shall consist of one hundred pounds avoirdupois, and twenty such hundreds shall constitute a ton," it was held that evidence that by custom or mercantile usage a "ton" of hemp consisted of twenty-four hundred pounds, instead of twenty hundred, was not admissible to interpret a contract in which G. agreed to sell to M. "thirty-five tons of hemp of the best quality."<sup>6</sup> Where a New Hampshire law enacted that "all round timber, the quantity of which is estimated by the 'housand, shall be measured according to the following rule, viz.: a stick of timber sixteen inches in diameter and twelve inches in length shall constitute one cubic foot, and the same ratio for any size and quantity; each cubic foot shall constitute ten feet of a thousand," a local usage, known as the Blodgett measure, which allowed at the rate of one hundred and fifteen feet for a thousand, was held inadmissible.<sup>7</sup> Where a statute declares that "two thousand pounds shall make one ton," a custom with dealers in pig-iron to buy and sell by the gross ton of two thousand two hundred and sixty-eight pounds is inadmissible.<sup>8</sup>

<sup>1</sup> *Hockin v. Cooke*, 4 Term Rep. 314.

<sup>2</sup> *Master of St. Cross v. Lord Howard de Walden*, 6 Term Rep. 338.

<sup>3</sup> 3 El. & Bl. 954.

<sup>4</sup> *Giles v. Jones*, 11 Exch. 393.

<sup>5</sup> *Ante*, p. 420.

<sup>6</sup> *Green v. Moffett*, 22 Mo. 529.

<sup>7</sup> *Rogers v. Allen*, 47 N. H. 529.

<sup>8</sup> *Evans v. Myers*, 25 Pa. St. 114; *Weaver v. Fegely*, 29 Pa. St. 27.

## Offices and Officers.

§ 218. *Statutes as to Officers' Duties — Inconsistent Usages.*—Where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner. Thus, where a statute required the demand of acceptance or payment of a bill of exchange to be made in a certain manner, a custom among notaries in the city of New York to make a demand in a different manner was held inadmissible.<sup>1</sup> Where a statute described certain prison limits beyond which prisoners should not be allowed to go, a contrary usage was held bad.<sup>2</sup> And where a statute prohibits highway surveyors from engaging labor without the express authority of the board of selectmen, a contrary usage is bad.<sup>3</sup> Where the United States statutes require the licenses of vessels to be renewed at a certain time, under a penalty, a custom for purchasers to await the close of navigation before making application for a renewal will be no protection.<sup>4</sup> And where the capital stock of a foreign manufacturing corporation was required to be taxed at its full value, the usage of the assessors to make certain deductions was rejected. In another case, the defendants were street-sprinklers, and were sued for an injury caused by the plaintiff falling on a piece of ice which had formed from water escaping from a hydrant. A city ordinance required that persons holding such licenses as defendants had should make their own attachments for filling their water-carts, and keep their attachments in repair. The water was shut off in November, and the accident occurred in the succeeding month. On the trial, the defendants offered to prove a custom among street-sprinklers that at the close of the season for sprinkling the streets, when the water was supposed to be shut off, the boxes and pipes were not visited until the opening of the season in the spring. The evidence was held inadmissible.<sup>5</sup>

An officer being required by law to execute his duties in a certain manner, a custom that he may execute them in a different manner will not be recognized; and this is so, even though he believes that the duties cannot be satisfactorily executed in the manner prescribed. In *Delaplaine v. Hozall*,<sup>6</sup> a statute of Virginia relating to the inspection of flour provided as follows: "Every inspector, by himself or a deputy, shall attend, when required, at such time and place within his county or inspection-district as the owner of any commodity of which he is inspector may appoint, and examine such commodity, by boring through the head, in case of a barrel, with an auger not exceeding half an inch in diameter," etc. An inspector claimed the right, by custom, to use a larger auger, for the reason that the auger prescribed was too small in size. But the court refused to recognize the alleged custom, saying: "As to the size of the auger which the inspector of flour is permitted to use, I think there can be no real question. It is true that the inspector avers, in his return to the writ, that he cannot make a satisfactory inspection by boring with an auger of no greater diameter than half an inch, and that it had always been the custom of the inspectors to bore with an auger of greater diameter, such as he had been in the habit of using. But the averment that the inspection could not be made in a satisfactory manner with a half-inch auger was one which, I think, it was not com-

<sup>1</sup> *Ostego County Bank v. Warren*, 18 Barb. 290; *Commercial Bank v. Varnum*, 3 Laus. 90.

<sup>2</sup> *Trull v. Wheeler*, 19 Pick. 240.

<sup>3</sup> *Scribner v. Hollis*, 48 N. H. 30.

<sup>4</sup> *The Forrester*, Newb. Adm. 81.

<sup>5</sup> *Dwight v. Mayor of Boston*, 12 Allen. 316.

<sup>6</sup> *Crocker v. Schureman*, 7 Mo. App. 358.

<sup>7</sup> 15 Gratt. 459.



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Statutes Concerning Officers' Duties and Compensation.

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petent for the inspector to make. The law had ascertained that a satisfactory inspection could be made with such an instrument, and it was not for him to gainsay it. And it is in vain to appeal to custom to justify so plain a deviation from the requirement of the statute. Much of what has been said upon the other branch of this case will apply on this point to this, and I shall not, therefore, repeat it. I will content myself with saying that, in my judgment, this statute needs, and will admit of no resort to a usage or custom for its interpretation. To adopt it would be, not to construe the law, but to set up something in direct contravention of its provisions. The restriction upon the size of the auger was most probably intended to limit the loss that might unavoidably occur in the process of inspection, through injury to the surrounding mass by the admission of air and weakening the head of the barrel, and parties are as much entitled to have it respected as any other requirement of the act; and if the inspector will persist in disregarding it, any party aggrieved is clearly entitled to the *mandamus* to enforce it."

A custom which gives to a public officer a portion of the goods of the citizen with which he is called upon to deal in the discharge of his office, by way of additional compensation or perquisite over and above what the law expressly provides as his fee, is bad. Thus, where an inspector of flour, who under a statute of Virginia was allowed a certain money compensation for his services, sought to establish a custom among flour inspectors in that State to take to their own use, in addition to the legal fees, the flour drawn from the barrel in process of inspection, called the draught flour, the court refused to sanction it, as both unreasonable in itself and contrary to the statute creating the office and providing the compensation thereof.<sup>1</sup> "The custom, it seems to me," said LEE, J., "is also bad because in conflict with the general policy of the law, and this in several respects. It is certainly a marked feature in our system of offices that the compensation of public functionaries shall be fixed and certain. It is a great and pervading principle of our Code, and is essential to the purity and impartiality of the government. The idea of a 'perquisite of office,' in the sense of a fee or allowance for services beyond the ordinary salary or settled wages, has no place in our legislation, but seems to be repudiated by the most necessary implication. Once to admit it, is to open a wide door for imposition and corruption. Dr. Webster tells us that the common acceptance of the word in America is a fee to an officer for a specific service, in lieu of an annual salary; but he gives also the other sense in which it is elsewhere used. The salaries fixed in our Code for some officers, the specified fees for services allowed to others, and the penalties imposed in some instances for demanding fees for services not performed, or for demanding greater fees for services than those allowed by law, all show the intention of the Legislature that the compensation to the officer should be restricted to the fees expressly provided. In the inspection laws throughout, the fees are specifically named, and the idea of any further compensation would seem to be plainly excluded. For many years, indeed, prior to 1792, after the sum named were added the words, 'and no more,' which served not merely to limit the pecuniary fee to be paid down, but to exclude the idea of any other compensation, and thus discountenance the custom of taking the draught flour; and although in that year these words were

<sup>1</sup> *Delaplaine v. Crenshaw*, 15 Gratt. 457.



## Offices and Officers.

dropped, it was doubtless because they were deemed surplusage, the idea having been sufficiently expressed, as the words, 'to be paid down by the owner,' found in previous acts, had been dropped in 1787. And when the present Code fixes the inspector's fee at one cent the barrel, it can hardly mean to give as much more in the form of flour as the inspector may think it necessary to take for the purpose of inspection. Now, although a custom, when otherwise good, may override and displace the common-law rule, yet a statute introducing a new principle, with a negative either express or necessarily implied, must be strictly pursued, and no custom can be set up against it.<sup>1</sup> And such is, I think, the character of these inspection laws, for a negative to any other compensation than the fee expressly given arises from most necessary implication. And although a custom or usage may be invoked to interpret a statute or a contract that needs interpretation, where something is to be done not sufficiently explained, yet where there is no doubt or ambiguity it cannot be resorted to to contradict what is plain, or to control, vary, or add to or diminish what is expressed in formal and deliberate terms.<sup>2</sup> This custom also, as it seems to me, necessarily contravenes the policy of the provision forbidding an inspector to trade in any commodity of which he is inspector. For, when it is considered that this inspector withdrew for his own benefit very nearly sixty thousand pounds of flour on the inspections for one house within a period of seventeen months, and that for the year ending June 30, 1858, the number of barrels inspected was six hundred and fifteen thousand two hundred and twenty-nine, and that for two quarters only, ending December 31, 1858, the number was four hundred and one thousand seven hundred and thirty-eight, it must be perceived that the inspector becomes, of necessity, a large dealer in the commodity of flour. It is true, the section authorizes the inspector to sell any commodity which he may have received in payment of his fees, but by this doubtless is meant any article for which he agrees that the fee allowed him by law may be commuted. I cannot think that the act contemplated anything in the nature of a perquisite to be received in kind by the inspector, over and above the fee prescribed. I think it a sound principle of construction that a law imposing burdens, like any act granting privileges in derogation of common right, should be interpreted favorably to the public, and if there be even reasonable doubt as to the extent to which it goes, such doubt should be resolved in their favor. If a definite and described charge be made, there can be no room to presume that some other and further burden in respect of the same subject was intended to be imposed.<sup>3</sup>

In *Frazier v. Warfield*,<sup>4</sup> a long-established custom had existed in Baltimore by which the weight of a lot of wheat, as between buyer and seller, had always been ascertained by weighing one bushel in sixty. In 1858 the Legislature of Maryland passed an act to regulate the inspection of grain, which, after appointing certain inspectors to examine all wheat in the city of Baltimore, provided, among other things, as follows: "That the said inspectors shall also carefully weigh and determine the weight of *all wheat* that shall be inspected by them or

<sup>1</sup> Dwar. on Stats. 475, 477; Lord Lovelace's Case, W. Jones, 270; Jones v. Smith, 2 Bulst. 36; King v. Bishop of London, Show. 413, 420; 9 Bac. Abr., tit. "Statute," G, 237; Sedgw. on Stat. & Const. Law, 38, 39.

<sup>2</sup> 1 Greenl. on Ev., §§ 292, 293, and cases cited in *Blackett v. Royal Exchange Assur. Co.*, 2 Crompt. & J. 244; *The Reeside*, 2 Sumn. 567 (opinion of Story, J.).

<sup>3</sup> 13 Md. 279.

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Statutes as to Usury — Shipping Articles.

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carried to the city for sale, and for that purpose shall procure, at reasonable and proper cost, suitable weights and scales to effect the purpose herein contemplated." The question was whether the inspectors could continue to weigh the wheat according to the old custom. The Superior Court, before whom the case first came, decided that they were bound, under the new law, to weigh the whole parcel, resting its decision on the ground that the old mode had worked injustice to the seller, which the statute was passed to remedy, and that "all wheat," as used in the statute, could not be construed to mean one-sixth of the wheat. The Court of Appeals reversed this ruling, holding that the act was not intended to introduce a new mode of weighing, but for the purpose of placing between buyer and seller an impartial officer of the law. As the only question decided in this case was as to the intention of the Legislature in passing the act, and their meaning as expressed therein, it does not conflict with the general rule stated at the beginning of this section.

§ 219. **Statutes prohibiting Usury—Contrary Usages.**—A usage to lend and borrow money at a higher rate of interest than is allowed by the statute against usury is void.<sup>1</sup> Thus, it being held that casting interest upon the principle that thirty days are the twelfth of a year, sixty days the sixth, and ninety days the fourth of a year, and the three days of grace the tenth of a month, and discounting a note upon such a calculation, is usurious, the note is not saved by a custom among banks to calculate interest in this manner.<sup>2</sup> As said by the chancellor in *Dunham v. Gould*,<sup>3</sup> "It is perfectly idle to talk of a custom among merchants to take a commission above the legal rate of interest on the exchange of notes. Custom of merchants is not applicable to such a case. It is not matter of trade or commerce within the law-merchant, and if there were such a local usage in New York, it would be null and void, and could not be set up as a pretext or cover to trample down the law of the land. The money-lenders throughout the country might as well set up a practice of their own, and then plead it in bar of the statute." And the statutes concerning legal tender cannot be affected by the local usages of banking-houses.<sup>4</sup>

§ 220. **Statutes as to Shipping-Articles and Carriers—Customs.**—Instances of customs being refused by the courts to control or vary acts required by statute to be performed in a certain manner, are to be found in the case of shipping-contracts. A United States statute, for example, required the master of a ship, under a penalty, to make an agreement, in writing or in print, with every seaman on board his vessel, declaring the voyage and terms on which the seaman was shipped. In *Bogert v. Cauman*, the plaintiff was mate of a ship commanded by the defendant, but during the voyage he was degraded by the captain, and compelled to leave the ship. To prove the damages sustained, his counsel introduced the shipping-articles, from which it appeared that he was to receive \$40 a

<sup>1</sup> *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 Johns. 367; *Greene v. Tyler*, 39 Pa. St. 381; *Jones v. McLean*, 18 Ark. 458; *Niagara County Bank v. Baker*, 15 Ohio St. 68. And see *Floyer v. Edwards*, Cowp. 112.

<sup>2</sup> *New York Firemen's Ins. Co. v. Ely*, 2

Cow. 678; *Bank of Utica v. Wager*, 2 Cow. 712.

<sup>3</sup> 16 Johns. 367.

<sup>4</sup> *Marine Bank v. Rushmore*, 23 Ill. 463; *Marine Bank v. Birney*, 23 Ill. 90; *Marine Bank v. Ogden*, 23 Ill. 249.

## Miscellaneous Cases.

month as first mate. He then attempted to prove that he was also to have a certain privilege. THOMPSON, J.: "The testimony is inadmissible. You have produced a written contract, and all previous parol agreements are merged in it." He then offered to prove that it was the established usage of the city to allow this privilege, and that it was never expressed in the articles. But THOMPSON, J., rejected this evidence also.<sup>1</sup> Similar questions have been decided in the same way in England, and on the same ground, viz.: of the contract in question being one under a statute. In *The Isabella*,<sup>2</sup> the representative of the chief mate (he having died during the voyage) demanded wages under the shipping-articles on a voyage from London to the coast of Africa, and from thence to the West Indies, and also an additional sum as the value of a privilege of one slave, said to be part of the agreement, and a privilege due under the ordinary practice of that trade. But the court rejected that part of the petition claiming the privilege, observing that if any such understanding existed between the parties, care should have been taken to have had it inserted in the articles; that, the articles being required by statute, it was impossible to set up a demand of this collateral nature and to support it on the plea of a customary right. So, in *White v. Wilson*<sup>3</sup> the chief mate claimed, on a similar voyage, the value of a similar privilege, which was rejected, Lord ELDON saying: "If the legislature have decided that all agreements for wages shall be in writing, and the practice be not to put in writing contracts for the price of one, two, or more slaves, that practice, if allowed to prevail, may be made the means of evading the provisions of the act."

A statute of Iowa<sup>4</sup> provided that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers, which would exist had no contract, rule, or regulation been made or entered into." A cow was shipped on the defendants' road, to be carried from Solon to Iowa City. The animal was an imported thoroughbred short-horn, and was injured in transit by the negligence of the employees of the road. In an action for the injury, the defendants offered to prove that it was the custom of all the railroads in the State, including the defendants', not to be liable for blooded stock beyond the value of common stock. This evidence was excluded, and properly, as was held on appeal. "The contract, rule, or custom sought to be established," said ROTHWICK, J., "is therefore void, under sect. 1308 of the Code, which provides that 'no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into.' The rights of the parties are precisely the same under this statute as though no rule, custom, or contract existed, and the court properly refused to admit the offered evidence, and correctly instructed the jury that the defendant, as a common carrier of live stock, was bound to receive and ship the cow in question. It is argued that the value of high-bred cattle is not fixed and determinate, but is purely fanciful, and that there is no obligation upon the carrier to carry this particular class of stock, not in use for commercial purposes, and that therefore the rules, custom, and con-

<sup>1</sup> Anth. 97.<sup>2</sup> 2 Rob. Adm. 199<sup>3</sup> 2 Bos. & Pul. 116.<sup>4</sup> Code, § 1308.

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 Miscellaneous Statutes and Repugnant Usages.
 

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tract limiting liability are just and reasonable. But it will not do to say that the value of all cattle is the same, and that they are worth so much per pound. The fact that there is not so general a market for high-bred cattle as there is for common stock is not a criterion by which it may be said that the one is as valuable as the other. The value of a thing is what it will ordinarily sell for to persons who are accustomed to dealing in that class of property, and who desire to purchase. Such a rule would be wholly impracticable in its application; besides, as we have found, it is in direct conflict with the statute."<sup>1</sup> And a railroad company cannot establish a valid custom inconsistent with the spirit and object of its charter.<sup>2</sup>

§ 221. *Miscellaneous Statutes and repugnant Usages.*—The provisions of a statute, that "if three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot," cannot be evaded by showing that the parties charged with violating them were but acting in accordance with the custom of the country.<sup>3</sup> Where a statute provided that all sales of spirituous and intoxicating liquors should be made for cash, a custom among merchants to sell them at a thirty days' credit is inadmissible.<sup>4</sup> Where a statute provided that on all negotiable promissory notes payable at a future day certain, in which there was no express stipulation to the contrary, days of grace should be allowed, a usage among banks not to allow days of grace was rejected. "If this custom," said SHAW, C. J., "existed before the statute was passed, the statute did away with the effect of it. If it has grown up since, it was bad in the first instance, and in every repeated instance, and cannot be made good by time." And where a statute provides that "all bonds, contracts, and writings for the payment of money or other thing, or the performance of any act or duty, are assignable by indorsement,"<sup>5</sup> a custom of dealers in cotton to transfer warehouse-receipts by delivery is bad.<sup>7</sup> A custom that if fish caught within the State of Michigan, and sold in barrels to a dealer without express warranty, prove to be unsound, the seller shall refund the price, it is held in Michigan, tends to defeat the purposes of the inspection law of the State, and is therefore bad.<sup>8</sup> Where a statute as to partition fences requires that they shall be such "as good husbandmen generally keep," evidence that although a fence was not such, yet it was a customary one for the particular locality, is inadmissible.<sup>9</sup> Where a statute prohibited all work on the Sabbath day, except works of "necessity or mercy," it was held that a barber's apprentice could not be compelled to work on that day, notwithstanding it was the custom among the great body of mechanics, common laborers, and sea-faring men in the place, to resort to barbers' shops to be shaved on Sunday morning.<sup>10</sup> In a recent Pennsylvania case,<sup>11</sup> a coal company had pumped from its mines a quantity of water, which polluted a previously

<sup>1</sup> *McCune v. Burlington, etc., R. Co.*, Sup. Ct. Iowa, 1879.

<sup>2</sup> *Chicago, etc., R. Co. v. The People*, 56 Ill. 385.

<sup>3</sup> *Bankus v. The State*, 4 Ind. 114.

<sup>4</sup> "No usage respecting the dealings of merchants in the sales of ordinary merchandise, the traffic in which is lawful, and the profits of which are not limited, can have any influence in controlling an express pro-

vision of statute." Shaw, C. J., in *Mansfield v. Inhabitants*, 15 Gray, 149.

<sup>5</sup> *Perkins v. Franklin Bank*, 21 Pick. 483.

<sup>6</sup> Rev. Code Ala., § 1838.

<sup>7</sup> *Lehman v. Marshall*, 47 Ala. 362.

<sup>8</sup> *Tremble v. Crowell*, 17 Mich. 493.

<sup>9</sup> *Blizzard v. Walker*, 32 Ind. 437.

<sup>10</sup> *Phillips v. Innes*, 4 Cl. & Fin. 234.

<sup>11</sup> *Pennsylvania Coal Co. v. Sanderson*, Sup. Ct. Pa. 1880.

## Miscellaneous Cases.

pure stream of the plaintiff's, into which it found its way. In an action therefor, it was contended by the defendant that the customary mode of disposing of water pumped from the mines in that region had always been to allow it to flow into the adjacent natural watercourses and proof of such a custom was offered. But it was held in the Supreme Court that the custom would not help the defendant, and was of no effect, for three distinct reasons. "As a general custom," said GORDON, J., "it lacks the necessary age; for the beginning of deep coal-mining in the regions above named is quite within the memory of men yet living. Wanting this, it fails in a particular essential to the establishment of such a custom. But more fatal still to the defendant's pretension is the fact that the effort is thus to justify the disturbance of private property for the advancement of the private interests of the defendant corporation; and that not under the plea of an ancient customary use, arising before the plaintiff acquired title, but of a general custom which would authorize the present injury or destruction of the rights of riparian owners. But a custom such as this would not only be unreasonable, but also unlawful, and therefore worthless. It is urged that mining cannot be carried on without this outflow of acidulous water; hence, of necessity, the neighboring streams must be polluted. This is true; and it is also true that coal-mining would come to nothing without roads upon which to transport the coal after it is mined; therefore, roads are necessary; but it does not follow that for such purpose the land of an adjacent owner may be taken, or his right of way encumbered, without compensation. If, indeed, the custom set up were to prevail, then, at least so far as coal-mining companies are concerned, there would be an abrogation of the eighth section of Art. XVI. of the Constitution, which provides that 'municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction and enlargement of their works, highways, or improvements.' Not only would we thus have a custom superior to the supreme law of the land, but one reaching even beyond the possible sovereignty of the State, in that it would empower private persons, for private purposes, to injure or destroy private property, and that without compensation. A custom such as this is radically bad, and cannot be sustained." In a Massachusetts case, a servant was injured by the explosion of a steam-boiler in his master's manufactory. A statute required all steam-boilers to be provided with a fusible safety-plug. The defendant's boiler was not so provided; but in an action brought by the servant to recover damages for the injury, alleging that the injury was caused by the want of a proper gauge and similar appendages, the defendant sought to show that it was not customary among persons having in use such boilers as his, and in such establishments as his, to use the fusible safety-plugs, and asked an instruction that if his boiler was supplied with all such appurtenances and appliances for safety as such establishments were ordinarily supplied with, he was not liable, even though in fact he did not have the boiler supplied with the statutory safety-plug. In the Supreme Court it was ruled that the court below had rightly held that a custom not to observe the law could not be shown.<sup>1</sup>

<sup>1</sup> *Cayzer v. Taylor*, 10 Gray, 410.

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Statutes Construed by Usage.

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§ 222. **Statutory Exemptions cannot be waived by Usage.**—Where a statute lays down a certain rule, but prescribes that the parties may contract otherwise, a usage will not take the place of a contract. In *Walker v. Transportation Company*,<sup>1</sup> decided in the Supreme Court of the United States in 1865, the plaintiff had shipped upon one of the defendants' boats a cargo of grain, which was destroyed by fire while in their possession. The bill of lading excepted "perils of navigation," "perils of the sea," and other similar losses. By an act of Congress of March 3, 1851,<sup>2</sup> the owners of vessels, in case of loss by fire, are exempted from liability "unless such fire is caused by the design or neglect" of such owners; in other words, they are not liable for a loss by fire arising from the negligence of their officers or agents. There is a proviso in the act that it shall not "prevent the parties from making such contracts as they please, extending or limiting the liability of such owner." The loss in question being caused by the negligence of the defendants' agents, the plaintiff endeavored to show that the defendants were liable under this proviso, contending that the words "perils of navigation," "perils of the sea," in the bill of lading, by usage and custom, while excusing the carrier from accidental losses of various kinds, still held him liable for a loss by fire caused by the negligence of his servants. But the court held that there was nothing in the language of the words just cited that made the owner liable for such a loss; that usage could not add to words which did not express it a liability from which the act of Congress declared the defendants to be free; that the contract mentioned in the proviso, which could take a case out of the statute, must be one made by the parties, and not by custom or usage—in other words, an express contract.

§ 223. **Statutes may be construed by Usage.**—If the meaning of the words of a statute be uncertain, usage may be resorted to for the purpose of interpreting them. In a general statute, doubtful words may be explained by reference to general usage. In a statute applicable to a particular place only, ambiguous words may be construed by the usage at that place.<sup>3</sup> In the explanation of doubtful language in an act of Parliament, contemporaneous and continuing usage has always been much relied upon.<sup>4</sup> Usage has been frequently said to be one of the best guides to the construction of a statute.<sup>5</sup> In the case of *Magistrates of Dunbar v. Duchess of Roxburgh*,<sup>6</sup> it was expressly held that long usage is of no avail against plain statutory enactments, and that such a usage can be binding on parties only as the interpreter of a doubtful

<sup>1</sup> 3 Wall. 150.

<sup>2</sup> 9 Stats. at Large, 635.

<sup>3</sup> *Frazier v. Warfield*, 13 Md. 279; *Love v. Hinkley*, Abb. Adm. 437.

<sup>4</sup> *Grant on Corp.* 27; *Bank of England v. Anderson*, 3 Bing. N. C. 666; *Rex v. Scott*, 6 Term Rep. 604; *Rex v. Aire, etc.*, Nav. Co., 2 Term Rep. 604; *Attorney-General v. Newcombe*, 14 Ves. 18; *Mayor v. Long*, 1 Camp. 21; *Attorney-General v. Parker*, 3 Atk. 576; *Attorney-General v. Foster*, 10 Ves. 356; *Earl of Buckinghamshire v. Drury*, 2 Eden, 74; *Meriam v. Harsen*, 2 Barb. Ch. 232; *McKeen v. Delancy*, 5 Cranch, 32;

*Jackson v. Maer*, 2 Cow. 567; *McFerran v. Powell*, 5 Serg. & R. 106.

<sup>5</sup> *Bond v. Cronk*, 1 Halst. 119; *Taylor v. Griswold*, 3 C. E. Green, 222; *The State v. Jersey City*, 4 Zab. 108; *Polk v. Hill*, 2 Overt. 157; *Stevens v. Cox*, 4 Pa. St. 13; *Bandel v. Isaac*, 14 Md. 202; *Cameron v. Merchants, etc.*, Bank, 37 Mich. 240. "The uniform practice under this and similar statutes for fifty years," said Redfield, J., in one case, "is a matter of no slight weight in fixing the construction of a statute." *Sherwin v. Bugbee*, 16 Vt. 439.

<sup>6</sup> 3 Cl. & Fin. 335.



## Municipal Charters and Powers.

law, and as affording a contemporaneous exposition; but that where a statute is expressive as to some points and silent as to others, usage may well supply the defects if not inconsistent with the express directions of the statute.

§ 224. **Municipal Charters and Powers as affected by Usage.**—In England, municipal corporations exist and exercise power and authority by virtue of a long-established usage or prescription; which supposes a grant by charter or act of Parliament which has been lost.<sup>1</sup> Many cases of customs affecting municipal corporations are, therefore, to be found in the books which are of no special interest in this country, and of no practical value—such as customs supporting monopolies;<sup>2</sup> to compel the officers to give a dinner;<sup>3</sup> to compel the acceptance of an office;<sup>4</sup> to enforce penalties;<sup>5</sup> to regulate the election of officers;<sup>6</sup> to prove the existence of a by-law,<sup>7</sup> or the existence of a charter,<sup>8</sup> or the right to a corporate name.<sup>9</sup> With respect to the means of arriving at the proper construction of a charter, Mr. BROWN says:<sup>10</sup> “The best means that can be resorted to for the interpretation of charters containing dubious or obscure expressions is contemporaneous usage, for *optimus interpres rerum usus*; and contemporaneous usage is always admissible for obtaining the true intention of such expressions, and, generally, it may be laid down that the uniform course of modern decisions fully establishes the rule that however general the words of ancient grants may be, they are to be construed by evidence of the manner in which the thing granted has always been possessed and used.” But, though usage is competent to explain doubtful expressions in a charter, it is not so to elucidate its general terms.<sup>11</sup> The word “inhabitant,” as used in a charter, has been construed by usage.<sup>12</sup> And a usage, however ancient, is overthrown and

<sup>1</sup> Dill. on Mun. Corp., chap. 5, § 56.

<sup>2</sup> *Bosworth v. Bugden*, 7 Modern, 459.

*Colchester v. Goodwin*, Cart. 117; *Player v. Jones*, 1 Vent. 21; *Bosworth v. Horne*, 2 Stra. 1085; *Player v. Vere*, T. Raym. 288; *Bowdye v. Fennell*, 1 Wils. 233; *Tailors of Bath v. Glazby*, 2 Wils. 266; *Harrison v. Godman*, 1 Burr. 36; *Hesketh v. Braddock*, 3 Burr. 1858; *Wooly v. Idle*, 4 Burr. 1592; *King v. Coopers' Co.*, 7 Term Rep. 543; *King v. Tappenden*, 3 East, 186; *Chamberlain of London v. Compton*, 7 Dow. & Ry. 601; *Clark v. Denton*, 1 Barn. & Adol. 92; *Clark v. Le Cren*, 9 Barn. & Cress. 52; *Davis v. Morgan*, 1 Crompt. & J. 587; *Fazakerley v. Wiltshire*, 1 Stra. 466.

<sup>3</sup> *Carter v. Sanderson*, 5 Bing. 79; *Wallis' Case*, Cro. Jac. 555.

<sup>4</sup> *Grafton's Case*, 1 Modern, 10; *Rex v. Grosvenor*, 1 Wils. 18.

<sup>5</sup> *Clark v. Tucker*, 3 Lev. 282; *Lee v. Wallis*, 1 Keny. Cas. 275; *Rex v. Feversham*, 8 Term Rep. 356; *Player v. Vere*, T. Raym. 328; *Rex v. Spencer*, 3 Burr. 1838.

<sup>6</sup> *Case of Corporations*, 4 Coke, 77; *Rex v. Atwood*, 1 Nev. & M. 286.

<sup>7</sup> *Rex v. Tomlyn*, Cases temp. Hardw. 316; *Rex v. Miller*, 6 Term Rep. 280; *Rex v. West-*

*wood*, 4 Barn. & Cress. 786; *Taylor v. Griswold*, 2 C. E. Green, 233; *Perkins v. Cutters' Co.*, 1 Selw. N. P. 1144.

<sup>8</sup> *Town of Pawlet v. Clarke*, 9 Cranch, 294; *Dillingham v. Snow*, 7 Mass. 547; *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Bow v. Allenstown*, 34 N. H. 351; *Hagerstown Turnpike Co. v. Creeger*, 3 Har. & J. 122; *Shrewsbury v. Hart*, 1 Car. & P. 113.

<sup>9</sup> *All Saints' Church v. Lovett*, 1 Hall, 141; *Trott v. Warren*, 2 Fairf. 227; *Dutchess Cotton Man. Co. v. Davis*, 14 Johns. 238; *Middlesex Husbandmen v. Davis*, 3 Metc. 133; *Robie v. Sedgwick*, 35 Barb. 319.

<sup>10</sup> Brown on Corp. 27.

<sup>11</sup> *Rex v. Grant*, 1 Barn. & Adol. 111; *Withnell v. Gartham*, 6 Term Rep. 388; *Blankney v. Winstanley*, 3 Term Rep. 279; *Davis v. Waddington*, 7 Man. & G. 42; *Governors v. Scarlett*, 2 You. & J. 330; *Bailiffs v. Bricknell*, 2 Taun. 120; *Rex v. Johns, Loft*, 77.

<sup>12</sup> *Rex v. Mashiter*, 6 Ad. & E. 163; *Rex v. Davie*, 6 Ad. & E. 374; *Withnell v. Gartham*, 6 Term Rep. 398; *Attorney-General v. Parker*, 3 Atk. 576; *Attorney-General v. Foster*, 10 Ves. 335; *Attorney-General v. Newcombe*, 14 Ves. 1. And see *Dundee Harbor Trustees v. Dougall*, 1 Sc. App. Cas. 20.



## Statutes Construed by Usage.

abrogated by the acceptance of a charter inconsistent with it.<sup>1</sup> "A usage not inconsistent with a charter, nor repugnant to it, may continue notwithstanding the acceptance of a charter, but a usage repugnant to the charter cannot." This was laid down distinctly by TENTERDEN, C. J., in an early case, where the charter of a city provided that vacancies in the council should be filled by the election of "burgesses and inhabitants" of the city. The defendant, who was not an inhabitant of the city, was elected to fill a vacancy in the council, and sought to defend his title by a usage in the city to elect burgesses not inhabitants thereof. But it was unanimously ruled in the King's Bench that the usage was repugnant to the charter, and could not be pleaded.<sup>2</sup>

Likewise, in this country, custom has been looked to for the purpose of interpreting the meaning of particular phrases in charters giving authority to municipal corporations. Thus, in *Willard v. Newburyport*,<sup>3</sup> it was said that the term "prudential concerns" embraced those subjects affecting the accommodation and convenience of the inhabitants not otherwise specifically provided for, which had been placed under the jurisdiction of towns either by statute or by usage. So, in a later case in the same State, where the same words were in dispute, the court said: "In looking to usage and custom as the means of ascertaining what subject of common interest is embraced under the term 'prudential,' the court are of opinion that the erecting of a market-place in the large towns and populous villages is embraced. \* \* \* It may be suggested that referring to usage as a source of this power is still leaving the subject open to doubt. It does so; but as there are some subjects which have long been regarded as within the authority of towns, not made so by statute, and as such powers have never been questioned, there is no authority whence they can be derived but usage. Indeed, a recurrence to the history of the formation of towns will show that most of the powers originated in usage, founded on the convenience and necessities of the inhabitants, and were afterwards recognized and confirmed by statute."<sup>4</sup> But, as said by a learned writer, usage in this country has a much more limited operation; and it seems to be a necessary result of the creation of municipal corporations by legislative acts, wherein their powers and duties are expressly prescribed; that these powers and duties cannot be added to, enlarged, or diminished by usage or custom.<sup>5</sup> Where the charter of a city provided that no contract should be binding on it unless made by some authorized agent and an appropriation therefor voted, it was held that it was not liable for legal services, beneficial to the city, performed by counsel retained by a majority of the board of aldermen without any official action of either branch of the council, although the usage of the city had been to pay such bills as were approved by a committee of either board without any formal vote.<sup>6</sup> And an unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued. Thus, in *Hood v. Lynn*,<sup>7</sup> a custom in the town of Lynn to celebrate the

<sup>1</sup> *Powell v. Regina*, 2 Bro. P. C. 298; *Haddock's Case*, T. Raym. 435.

<sup>2</sup> *Rex v. Salway*, 9 Barn. & Cress. 424; *Rex v. Chester*, 1 Mau. & Sel. 101.

<sup>3</sup> 12 Pick. 277.

<sup>4</sup> *Spaulding v. Lowell*, 23 Pick. 71; *Smith v. Cheshire*, 13 Gray, 308.

<sup>5</sup> *Dill. on Mun. Corp.* 230.

<sup>6</sup> "The usage here attempted to be established," said the court, "is in violation of the general law and the charter and ordinances of the city. The doing of one wrong does not excuse another." *Butler v. City of Charlestown*, 7 Gray, 12.

<sup>7</sup> 1 Allen, 103.

## Contradictory Opinions.

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Fourth of July was ineffectual to sustain a vote of money for such a purpose, not authorized by the charter; and in *Benott v. Conway*,<sup>1</sup> authority in a town treasurer to borrow money on the credit of the town was held not sustainable by proof of a usage to that effect—in the first case it being laid down that the custom of a municipality, in order to be valid, must be a custom necessary to the exercise of some corporate power or the enjoyment of some corporate right, or one which contributes essentially to the necessities and conveniences of the inhabitants.

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§ 225. Customs and Usages not inadmissible because in conflict with Common-Law Rules.—It was no objection to a common-law custom that it was contrary to the common law of the land;<sup>2</sup> otherwise the customs of gavel-kind or borough-English, which are directly opposed to the law of descent; the custom of Kent, which is inconsistent with the law of escheats, and many other customs in conflict with common-law rules or maxims, could not have been recognized. In general, too, evidence of a usage of trade is not inadmissible because it is contrary to the principles of law governing such cases; for it is obvious that if proof of a usage could be rejected because it established something different from the law, no custom would ever be proved, because if it were not different it would be a part of the law.

§ 226. Contradictory Expressions of some Courts on this Subject.—This being so plain, it is somewhat startling to find a large number of cases in the reports in which the principle is broadly laid down that a usage or custom in opposition to an established rule of law is void and of no effect. Thus, in 1760, Lord MANSFIELD, speaking of evidence of custom in an action on a bill of exchange, said: "The point of law is here settled, and when once solemnly settled, no particular usage shall be admitted to weigh against it. This would send everything to sea again."<sup>3</sup> In *Eager v. Atlas Insurance Company*,<sup>4</sup> WILDE, J., said: "Now, it seems to me very clear that no particular usage opposed to the established principles of law can be sustained." In *Warren v. Franklin Insurance Company*,<sup>5</sup> CHAPMAN, C. J., said: "This being the rule of law as to damages, the custom of a particular port could not vary it." In *Bargett v. Orient Insurance Company*,<sup>6</sup> BOSWORTH, J., said: "No usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the settled law of the State has adjudged them to be." In *Homer v. Dorr*,<sup>7</sup> the Supreme Judicial Court of Massachusetts said: "Evidence of custom and usage is useful in many cases to explain the intent of parties to a contract. But the usage of no class of citizens can be sustained in opposition to principles of law." In *Rapp v. Palmer*,<sup>8</sup> ROGERS, J., said: "Although a usage is often resorted to for explanation of commercial instruments, it never is or ought to be received to contradict a settled rule of commercial law." In *The Pacific*,<sup>9</sup> DEADY, J., said: "The law, and not such a custom, ascertains and limits the rights and liabilities of shippers and common carriers." In *Schieffelin v. Har-*

<sup>1</sup> 10 Allen, 523.

<sup>2</sup> *Horton v. Beckman*, 6 Term Rep. 760.

<sup>3</sup> *Edie v. East India Co.*, 1 W. Black. 295;

<sup>4</sup> *Burr*, 1216.

<sup>5</sup> 14 Pick. 141.

<sup>6</sup> 104 Mass. 518.

<sup>7</sup> 3 Bosw. 335.

<sup>8</sup> 10 Mass. 26.

<sup>9</sup> 3 Watts, 178.

<sup>10</sup> 1 Deady, 17.

## Contradictory Expressions of Individual Judges.

vey, THOMPSON, J., said: "The established principles of law cannot be controlled by custom." In *Minnesota Central Railway Company v. Morgan*, MILLER, J., said: "No custom can be established which contravenes a well-settled principle of law." In *Raisin v. Clark*,<sup>2</sup> MILLER, J., said: "A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice." In *Thompson v. Riggs*,<sup>3</sup> Mr. Justice CLIFFORD said: "Usage contrary to law, or inconsistent with the contract, is never admitted to control the general rules of law or the real intent and meaning of the parties." In *Hone v. Mutual Safety Insurance Company*,<sup>4</sup> SANDFORD, J., said: "We find it clearly settled that a general usage, the effect of which is to control rules of law, is inadmissible; so of one which contradicts a general rule of commercial law." In *Frith v. Barker*,<sup>5</sup> KENT, C. J., said: "Though usage is often resorted to for explanation of commercial instruments, it never is, nor ought to be, received to contradict a settled rule of commercial law." In *Reed v. Richardson*,<sup>6</sup> the court said: "The usage in question is objectionable and invalid, for it tends to contravene the fixed rule of law." In *Barnard v. Kellogg*,<sup>7</sup> Mr. Justice DAVIS said: "It is well settled that usage cannot be allowed to subvert the well-settled rules of law." In *South-Western Freight and Cotton Press Company v. Stanard*,<sup>8</sup> WAGNER, J., said: "Evidence of custom, however, is never admissible to oppose or alter a general principle or rule so as to make the rights and liabilities of parties other than they are at law." In *Meaher v. Lufkin*,<sup>9</sup> WHEELER, J., said: "There is nothing in the objection that proof of a custom was admitted to vary the law of the land. That, it is admitted, cannot be done." In *Stillman v. Hurd*,<sup>10</sup> HEMPHILL, C. J., said: "The custom, if any such exists, is in contravention of established law." In *Lockhart v. Devrees*,<sup>11</sup> LIPSCOMB, J., said: "It has never, it is believed, been held that an acknowledged rule of law could be subverted by local custom." In *Brown v. Jackson*,<sup>12</sup> Mr. Justice WASHINGTON said: "The law upon this subject is settled. It would, therefore, be improper to let a contrary usage be proved, which is only proper in doubtful cases." "The practice of the New York stock market, as testified to by one of the witnesses," said EWING, C. J., in a New Jersey case, "can have no weight on this question. We are to seek what was required by the grave and steady rule of law, not what would satisfy the eagerness of speculation, grasping its object on one hand with bold temerity, and parting from it on the other with suspicious haste. A mournful history tells us there were at that time in the stock market many practices which neither the law nor good morals could uphold."<sup>13</sup> In *Inglebright v. Hammond*,<sup>14</sup> CALDWELL, J., said: "Evidence of custom may properly be given to explain and give the proper effect to the contracts and acts of parties, but it would be carrying the doctrine too far to permit a custom to change the title to property contrary to an established rule of law." In *Smetz v. Kennedy*,<sup>15</sup> EVANS, J., said: "No custom or usage can be allowed which repeals the law of the land."

<sup>1</sup> 52 Barb. 217.<sup>2</sup> 41 Md. 158.<sup>3</sup> 5 Wall. 663.<sup>4</sup> 1 Sandf. 137.<sup>5</sup> 2 Johns. 327.<sup>6</sup> 98 Mass. 216.<sup>7</sup> 10 Wall. 383.<sup>8</sup> 44 Mo. 71.<sup>9</sup> 21 Texas, 385.<sup>10</sup> 10 Texas, 109.<sup>11</sup> 1 Texas, 535.<sup>12</sup> 2 Wash. C. Ct. 24.<sup>13</sup> *McCourry v. Suydam*, 10 N. J. L. 245.<sup>14</sup> 19 Ohio, 337. <sup>15</sup> Riley, 218.

## Banks and Banking.

These expressions are not ambiguous; no other meaning can be given to them except this: that a custom or usage which changes what would otherwise be the situation of the parties, or alters to any extent their rights according to the rules of law applicable to such cases, is invalid and ineffectual. The meaning of the terms "rules of law," "principles of law," "settled law," "established rules of law," as they are used by the judges whom we have just cited, is not difficult to arrive at. They do not refer to the laws established by the legislature, and which we find in the statute-book; they refer to the rules adopted and the doctrines established by the courts for the conduct of the citizen and the preservation and enforcement of his rights — the precedents which we find in the reports; in short, the common law of the land.

§ 227. **Same — Conflicting Decisions.** — But, as we have seen in former chapters of this work, particularly in the chapter on Usage and Custom in Different Relations and Occupations,<sup>1</sup> evidence of custom or usage is most potent in modifying or entirely altering the position of parties from what it would otherwise be, judged by the ordinary rules of law applicable to such cases or transactions. Nevertheless, this species of evidence is not always so successful, as the reported adjudications in which custom and usage have been set up to affect certain "established rules of law" applicable to particular relations will show.

§ 228. **Banks and Banking — Usages against Legal Rules admitted.** — In the law of banks and banking, and negotiable and assignable paper, the following legal rules have been controlled or altered by proof of a different usage in individual cases: 1. The general rules of law as to the time and place and mode of making demand and giving notice of bills and notes.<sup>2</sup> 2. The rules of law as to the powers of bank officers and agents.<sup>3</sup> 3. The rule that a bank receiving a check for collection has until the close of banking-hours on the next business-day in which to present it.<sup>4</sup> 4. The rule that a bank to whom a note is sent for collection need not notify all the indorsers.<sup>5</sup> 5. The rule that a bank, acting as the collecting-agent of another, has no right to receive in payment anything but money.<sup>6</sup> 6. The rule that a banker, being bound to know the signature of his customer, pays a forged check on him at his peril.<sup>7</sup>

§ 229. **Same — Usages against Legal Rules rejected.** — On the other hand, in individual cases usages and customs inconsistent with the following rules of law have been rejected by the courts: 1. The rule of law that negotiable paper not payable instantly is entitled to days of grace; otherwise, not.<sup>8</sup> 2. The rule of law that where a bank receives a sum on a general deposit, it is bound to respond to the depositor, when called on for a like sum, in good money.<sup>9</sup> 3. The rule of law that where the holder of a bank-bill has voluntarily cut it in two, for the purpose of transmitting it by mail, whereby one part is lost, he may recover the full amount from the bank upon presenting the one half and proving the loss of the other.<sup>10</sup> 4. The rule of law that the purchaser of negotiable paper

<sup>1</sup> *Ante*, Chap. III.

<sup>2</sup> *Ante*, Chap. III., §§ 68, 69.

<sup>3</sup> *Ante*, Chap. III., §§ 65-67.

<sup>4</sup> *Ante*, Chap. III., § 72.

<sup>5</sup> *Ante*, Chap. III., § 72.

<sup>6</sup> *Ante*, Chap. III., § 72.

<sup>7</sup> *Ante*, Chap. III., § 74.

<sup>8</sup> *Ante*, Chap. III., § 71.

<sup>9</sup> *Ante*, Chap. III., § 73.

<sup>10</sup> *Ante*, Chap. III., § 76.

## Usages in Conflict with Legal Rules.

past due takes it subject to the equities of other persons; he can acquire no better title than his transferor.<sup>1</sup> 5. The rule that money paid under a mistake of fact can be recovered back,<sup>2</sup> cannot be affected by a custom among banks generally, and insurance offices particularly, that no mistakes shall be rectified in the receipt or payment of money unless the mistake is discovered before the person paying or receiving leaves the office.<sup>3</sup>

§ 230. **Common Carriers — Usages in conflict with Rules of Law admitted.** — In the law of common carriers the following rules have been controlled by inconsistent usages: 1. The rule that a common carrier is one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place.<sup>4</sup> 2. The rule of law that the responsibility of the common carrier commences with the delivery of the goods to him or to his authorized servants.<sup>5</sup> 3. The rule that the carrier remains liable for the goods as an insurer (with exceptions) until he has made a legal delivery of them.<sup>6</sup> 4. The rule that in the carriage of goods by water, the carrier, unless otherwise directed, must stow them under deck.<sup>7</sup> 5. The rule that a carrier of goods by water is liable for damage done to them in the hold through contact with other goods.<sup>8</sup> 6. The rule that the carrier's liability continues until he has made personal delivery of the goods in his charge to whomsoever is properly entitled to receive them.<sup>9</sup> 7. The rule that the carrier must give notice of the arrival of the goods.<sup>10</sup> 8. The rule that the goods must be delivered on a legal day.<sup>11</sup> 9. The rule that an express carrier must make personal delivery of the goods in his charge.<sup>12</sup> 10. The rule that on the refusal of the goods by the party to whom they are sent, the expressman must give notice of such refusal to the consignee.<sup>13</sup> 11. The rule that, except in cases of emergency and necessity, a carrier has no authority to sell the goods in his charge.<sup>14</sup> 12. The rule that a carrier has no general lien for charges on the goods in his hands.<sup>15</sup> 13. The rule that credit given the customer by the carrier beyond the time when the goods are to be delivered, is inconsistent with and will defeat the lien.<sup>16</sup> 14. The rule that the common-law liability of a carrier can be restricted only by means of a contract.<sup>17</sup>

<sup>1</sup> *Ante*, Chap. III., § 77.

<sup>2</sup> *Filgor v. Penny*, 2 Murph. 182; *Lucas v. Worswick*, 1 Moo. & R. 293; *Osgood v. Jones*, 23 Me. 312; *Baltimore, etc., R. Co. v. Faunce*, 6 Gill, 68; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Henderson v. Planters' Bank*, 11 Rich. L. 44; *Garland v. Salem Bank*, 9 Mass. 408; *Logan v. Sumter*, 28 Ga. 242; *Dickens v. Jones*, 6 Yerg. 483; *West v. Houston*, 4 Harr. 170; *Lawrence v. American National Bank*, 54 N. Y. 432; *Millett v. Holt*, 60 Me. 189; *Vernon v. West School District*, 38 Conn. 112; *Duncan v. Berlin*, 46 N. Y. 885; *Kingston Bank v. Ellinge*, 40 N. Y. 391; *Young v. Stabellin*, 34 N. Y. 258; *Northrop v. Graves*, 19 Conn. 548; *Manchester v. Burns*, 45 N. H. 482; *Holbrook v. Allen*, 4 Fla. 87; *Guild v. Baldrige*, 2 Swan, 295; *Walker v. Mock*, 39

Ala. 568; *Illinois, etc., Ins. Co. v. Fox*, 53 Ill. 151.

<sup>3</sup> *Gallatin v. Bradford*, 1 Bibb, 209; *Mechanics', etc., Bank v. Smith*, 19 Johns. 115.

<sup>4</sup> *Ante*, Chap. III., § 78.

<sup>5</sup> *Ante*, Chap. III., § 79.

<sup>6</sup> *Ante*, Chap. III., § 83.

<sup>7</sup> *Ante*, Chap. III., § 84.

<sup>8</sup> *Ante*, Chap. III., § 84.

<sup>9</sup> *Ante*, Chap. III., §§ 85, 86.

<sup>10</sup> *Ante*, Chap. III., §§ 87-89.

<sup>11</sup> *Ante*, Chap. III., § 90.

<sup>12</sup> *Ante*, Chap. III., §§ 94-96.

<sup>13</sup> *Ante*, Chap. III., § 96.

<sup>14</sup> *Ante*, Chap. III., § 90.

<sup>15</sup> *Ante*, Chap. III., § 100.

<sup>16</sup> *Ante*, Chap. III., § 100.

<sup>17</sup> *Ante*, Chap. III., § 101.

## Corporations — Insurance.

§ 231. **Same — Usages in conflict with Rules of Law rejected.** — But the following rules have been maintained in the face of contradictory usages: 1. The rule that where freight is paid in advance, and in consequence of the capture or shipwreck of the vessel, or other cause not imputable to the consignor, the goods are not carried to their destination, the freight is not earned, and may be recovered back, unless there is an agreement to the contrary.<sup>1</sup> 2. The rule that a bill of lading is like any other receipt, and, so far as it is considered as such, may be explained or contradicted by parol.<sup>2</sup>

§ 232. **Corporations — Usages against Common-Law Rules admitted.** — In the law of corporations these rules have been modified or altered by usage and custom: 1. The rule that a corporation can express its assent only by means of its seal.<sup>3</sup> 2. The rule that where the charter of a corporation prescribes the particular mode in which its contracts shall be made, that mode must be pursued.<sup>4</sup> 3. The rule that no lien exists in favor of a corporation upon the shares of a stockholder who is indebted to it.<sup>5</sup>

§ 233. **Insurance — Usages in conflict with Legal Rules admitted.** — In the law of insurance the following "established rules of law" have been controlled by evidence of different customs: 1. The rule that a risk on a ship, or on goods therein, commences only at the very port or place named in the policy as that from which the ship is to sail, or where the goods are to be loaded, and ends only when the ship has reached the port to which it is insured.<sup>6</sup> 2. The rule that the meaning of the parties to the policy is invariably understood to be that the ship should proceed from one terminus of the voyage insured to the other in a direct course, without touching at any intermediate point or pursuing any intermediate adventure; therefore, if she do so without leave for that purpose being expressly given in the policy, this, however trifling in extent or duration, is a deviation, although the ship may afterwards return to her proper course, and this will discharge the underwriter.<sup>7</sup> 3. The rule that the ship must visit such ports in the geographical order of their distance from the terminus or port of departure.<sup>8</sup> 4. The rule that a deviation simply for the purpose of saving property will discharge the insurer.<sup>9</sup> 5. The rule that if goods are necessarily thrown overboard, for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because insured for the benefit of all, except as to the owner of goods loaded above deck.<sup>10</sup> 6. The rule that in a policy of marine insurance effected upon certain goods on an outward voyage and their "proceeds" home, the word "proceeds" means the same as "produce," viz.: something proceeding from, or produced by, something else, — the same amount or value of goods sold and converted into money, or goods purchased with such money, or exchanged for the original goods, — and cannot include the identical goods brought home on the return voyage.<sup>11</sup> 7. The rule that there can be no apportionment of the premium where the risk

<sup>1</sup> *Ante*, Chap. III., § 98.

<sup>2</sup> *Strong v. Grand Trunk R. Co.*, 15 Mich. 206.

<sup>3</sup> *Ante*, Chap. III., § 103.

<sup>4</sup> *Ante*, Chap. III., § 103.

<sup>5</sup> *Ante*, Chap. III., § 106.

<sup>6</sup> *Ante*, Chap. III., § 111.

<sup>7</sup> *Ante*, Chap. III., § 112.

<sup>8</sup> *Ante*, Chap. III., § 112.

<sup>9</sup> *Ante*, Chap. III., § 112.

<sup>10</sup> *Ante*, Chap. III., § 113.

<sup>11</sup> *Ante*, Chap. III., § 114.

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Co. v. Fox, 53 Ill.

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 Usages in Conflict with Legal Rules.
 

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is entire.<sup>1</sup> 8. The rule in the law of fire insurance that any alteration or change in the risk, made subsequent to the insurance, and which has the effect of materially increasing the risk, will avoid the policy.<sup>2</sup> 9. The rule that the keeping or use of articles prohibited by the terms of the policy will avoid it.<sup>3</sup> 10. The rule that where a life-policy provides that it shall be forfeited if the premium is not paid on the particular day, the insurer is discharged if it is not paid on that day.<sup>4</sup>

§ 234. **Same—Usages in conflict with Legal Rules rejected.**—On the contrary, usages to affect these rules have been rejected by the courts: 1. The rule that, unless specially provided for in the policy, the insured is not bound to inform the insurer of any change in adjoining premises, however much the risk may be increased thereby.<sup>5</sup> 2. The rule that reinsurance is a contract of indemnity to the reassured, and binds the reinsurer to pay to the reassured the whole loss sustained in respect of the subject insured, to the extent to which he is reinsurer.<sup>6</sup> 3. Where a fire-insurance company agreed in its policy that its directors should "settle and pay to the assured all losses within three months after notice shall have been given as aforesaid, and that the payment of the loss ascertained should be made within the time prescribed by the charter, without deduction from the sum decreed by the adjustment," proof of a usage on the part of the company, in case of a total loss, to retain of the amount of the ascertained loss two per cent per month on the balance of the premium-note, from the date of the last assessment upon it until the expiration of the term of the policy, was rejected. "The object and effect of the proof offered of the usage in this case," said Woods, J., "were plainly to vary and limit the plain and unequivocal terms of the policy, and to control and limit their construction and legal effect. To give the evidence of the usage the effect claimed for it, would be to allow the exact converse of the true and well-settled rule of law upon this subject to prevail. It would be to hold that while the contract, in express and unmistakable terms, provides that the whole loss shall be ascertained and paid to the assured, the usage shall control the express terms and give them the effect of a contract for the payment of a sum less than the whole loss sustained. It would be to allow the usage to control an express written contract and to limit its terms and effect, while it is well settled—in accordance with sound reason, too—that a usage shall be regarded as waived by the express terms of a contract when they are in conflict with each other."<sup>7</sup>

§ 235. **Landlord and Tenant—Customs against Law admitted.**—In the law of landlord and tenant these common-law rules have been altered by the custom of the country: 1. The rule that "if a tenant for years, knowing the end of his term, doth sow the land, and his term endeth before his crop is ripe, the lessor, or he in reversion, shall have the crop, because the lessee knew the certainty of his term, and when it would end."<sup>8</sup> 2. The rule that where there

<sup>1</sup> *Ante*, Chap. III., § 115.

<sup>2</sup> *Ante*, Chap. III., § 119.

<sup>3</sup> *Ante*, Chap. III., § 118.

<sup>4</sup> *Ante*, Chap. III., § 124.

<sup>5</sup> *Ante*, Chap. III., § 120.

<sup>6</sup> *Ante*, chap. III., § 123.

<sup>7</sup> *Swanscot Machine Co. v. Partridge*, 25 N. H. 369.

<sup>8</sup> *Ante*, Chap. III., § 127.



## Principal and Agent.

is no covenant in the lease by which the lessor undertakes to repair, he is not bound to do so, and the lessee cannot make repairs and charge the cost to him.<sup>1</sup> 3. The rule that on the sale of property the vendee must pay for the conveyance.<sup>2</sup> 4. The general rules as to fixtures between landlord and tenant.<sup>3</sup>

§ 236. **Contracts for Personal Services — Customs against Law admitted.** — In the case of contracts for personal service, the old rule that, the contract being entire, nothing can be recovered if it be but partially performed, may be altered by proof of usage.<sup>4</sup>

§ 237. **Same — Customs against Law rejected.** — In an early case in North Carolina it was held that, the law being that the hirer of a slave, and not the owner, was liable for medicine and medical services rendered the slave during the term of the hiring,<sup>5</sup> this rule could not be changed by a particular custom in a county that the owner should pay such expenses;<sup>6</sup> and this principle was extended in a later case to render of no account a local custom that if a female slave was delivered of child during her term of hiring, the owner should allow the hirer the sum of \$10.<sup>7</sup>

§ 238. **Partnership — Usages against Legal Rules admitted.** — In the law of partnership the following rules have been modified or altered by proof of usage: 1. The rule that general reputation cannot establish a partnership.<sup>8</sup> 2. The rule that persons cannot be charged as partners unless they are actually or impliedly such.<sup>9</sup>

§ 239. **Principal and Agent — Usages in conflict with Rules of Law admitted.** — These rules of law, as affecting the relation of principal and agent, have been changed by proof of a different usage: 1. The rule that an authority to do an act cannot be delegated to another.<sup>10</sup> 2. The rule that a factor has no implied authority to sell except for cash.<sup>11</sup> 3. The rule that a factor has no authority to pledge the goods of his principal as security for his own debt.<sup>12</sup> 4. The rule that the factor, unless authorized by his principal, cannot set off his private debt to the vendee against the vendee's debt on the sale; and the principal will not be bound by such a transaction.<sup>13</sup> 5. The rule that an agent is not personally bound by a contract made by him for his principal.<sup>14</sup>

§ 240. **Same — Usages in conflict with Rules of Law rejected.** — Other rules in the same relation have not been permitted to be affected by inconsistent customs, viz.: 1. The rule that profits made by an agent out of the principal's business belong to the principal, and not to the agent.<sup>15</sup> 2. The rule that an agent of the owner to sell property cannot be an agent for the purchaser as well, and receive pay from both.<sup>16</sup> 3. The rule that an agent must

<sup>1</sup> *Ante*, Chap. III., § 128.

<sup>2</sup> *Ante*, Chap. III., § 128.

<sup>3</sup> *Ante*, Chap. III., § 131.

<sup>4</sup> *Ante*, Chap. III., § 137.

<sup>5</sup> *Haywood v. Long*, 5 Ired. L. 438.

<sup>6</sup> *Jones v. Allen*, 5 Ired. L. 273.

<sup>7</sup> *Cooper v. Purvis*, 1 Jones L. 141.

<sup>8</sup> *Ante*, Chap. III., § 140.

<sup>9</sup> *Ante*, Chap. III., § 141.

<sup>10</sup> *Ante*, Chap. III., § 145.

<sup>11</sup> *Ante*, Chap. III., § 146.

<sup>12</sup> *Ante*, Chap. III., § 147.

<sup>13</sup> *Ante*, Chap. III., § 150.

<sup>14</sup> *Ante*, Chap. III., § 154.

<sup>15</sup> *Ante*, Chap. III., § 152.

<sup>16</sup> *Ante*, Chap. III., § 153.

## Usages in Conflict with Legal Rules.

follow the instructions of his principal.<sup>1</sup> 4. The rule that a person contracting as agent will be personally liable where he makes the contract in his own name.<sup>2</sup>

§ 241. **Vendor and Purchaser — Usages against Legal Rules admitted.** — The following rules of law governing sales of personal property have been modified or altered by proof of a different usage, viz.: 1. The rule that the mere exhibition, at the time of the sale, of a sample of the goods does not of itself constitute such a sale by sample as to subject the seller to liability upon an implied warranty.<sup>3</sup> 2. The rule that a purchaser entitled to rescind a contract, for fraud or other reasons, must rescind it *in toto*.<sup>4</sup> 3. The rule that where goods are sold for cash, and the seller delivers them to the purchaser upon the faith of his paying cash, and immediately demands it, but the buyer refuses to pay, the delivery is not absolute, but only conditional, and the seller may reclaim, the title never having passed away from him.<sup>5</sup> 4. The rule that where they are sold for cash, to be paid for on delivery, either in cash or commercial paper, and they are delivered without exacting the money or the securities, the delivery becomes absolute, and the title thereby vests in the purchaser.<sup>6</sup> 5. The rule that where no time for the payment of goods sold and delivered is fixed by the contract, the price becomes due and payable as soon as the delivery is completed.<sup>7</sup> 6. The rule that interest, in the absence of an agreement, is not allowed upon unliquidated accounts for goods, wares, and merchandise, for work done, or on book-accounts.<sup>8</sup>

§ 242. **Same — Usages against Legal Rules rejected.** — But in the law of sales, very many usages have been rejected when in conflict with the following legal rules, viz.: 1. The rule that on sales of personal property, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the articles he sells, the maxim *caveat emptor* applies, and the buyer takes the risk of the quality upon himself.<sup>9</sup> 2. The rule that if the sample be fairly drawn from the bulk of the goods, and the bulk corresponds with the sample, but there is a defect in both sample and bulk, and this defect is unknown and undiscernible, there is no implied warranty against this defect, and the seller is not responsible.<sup>10</sup> 3. The rule that upon the sale of an article by a manufacturer, there is an implied warranty that it will answer the purpose for which it is made.<sup>11</sup> 4. The rule that on a simple pledge of stock to a broker as collateral security, the pledgee has no right, without notice, to dispose of it because the pledgor fails to comply with his engagement.<sup>12</sup>

§ 243. **Miscellaneous — Usages contradicting Rules of Law admitted.** — So, the general rules of law governing the question of negligence,<sup>13</sup> or contributory negligence,<sup>14</sup> or nuisance, or fraud,<sup>15</sup> or trespass,<sup>16</sup> or the use of watercourses,<sup>17</sup> or

<sup>1</sup> *Ante*, Chap. III., § 153.

<sup>2</sup> *Ante*, Chap. III., § 154.

<sup>3</sup> *Ante*, Chap. III., § 160.

<sup>4</sup> *Ante*, Chap. III., § 164.

<sup>5</sup> *Ante*, Chap. III., § 165.

<sup>6</sup> *Ante*, Chap. III., § 165.

<sup>7</sup> *Ante*, Chap. III., § 166.

<sup>8</sup> *Ante*, Chap. III., § 167.

<sup>9</sup> *Ante*, Chap. III., § 158.

<sup>10</sup> *Ante*, Chap. III., § 160.

<sup>11</sup> *Ante*, Chap. III., § 161.

<sup>12</sup> *Ante*, Chap. III., § 162.

<sup>13</sup> *Ante*, Chap. III., §§ 169-172.

<sup>14</sup> *Ante*, Chap. III., § 171.

<sup>15</sup> *Ante*, Chap. III., §§ 173, 174.

<sup>16</sup> *Ante*, Chap. III., § 175.

<sup>17</sup> *Ante*, Chap. III., § 176.

## Miscellaneous Rules Rejected.

the execution of the duties of an officer,<sup>1</sup> have in many instances been controlled by evidence of usage and custom. It has been held in Pennsylvania that the common-law doctrine that fresh-water rivers in which the tide does not ebb or flow belong to the owners of the banks, does not apply to the Susquehanna, or the other large rivers of the State. But a custom that the owners of the banks of the Susquehanna should have the exclusive right to fish in the river opposite their shores was recognized.<sup>2</sup>

§ 244. *Same—Usages contradicting Rules of Law rejected.*—In an Alabama case, it was held to be the law that when a party-wall separating the buildings of adjacent proprietors, and erected by them at their joint expense, is destroyed by fire, there is no implied agreement between them, nor any legal obligation, to rebuild another wall on the same foundation; but one rebuilding on the same foundation could not compel a purchaser from the other proprietor to contribute to the cost of the wall, or to make compensation for using it in the subsequent erection of a building on the same lot; and that a usage on the part of lot-owners was not admissible to alter this rule.<sup>3</sup> In a Minnesota case, a custom by which a vendor of an article warranted to be genuine, but which turns out to be spurious, may satisfy his obligation by paying in kind instead of responding in damages according to the rules of the common law, was held to be invalid.<sup>4</sup> The rule that a second mortgagee with notice of a first mortgage is not affected by anything advanced subsequent to his mortgage with notice,<sup>5</sup> it is held in England, cannot be altered by a contrary custom between brewers and distillers and their customers.<sup>6</sup> Where the law fixes the end of a lease, evidence of a different custom is incompetent.<sup>7</sup> What is a good tender, it was held in Texas, could not be shown by local usage.<sup>8</sup>

§ 245. *The Necessity for reviewing the contradictory Cases.*—The student will doubtless have already observed that the rules of law which evidence of usage and custom has been offered or introduced to affect may be divided into distinct classes. In the first are those rules which, without a dissenting decision, have been modified or controlled, as occasion arose, by proof of a different usage. The second comprises those rules upon which there is a conflict of authority; one case holding that they may be modified by usage, another that they can not. In the third class fall those rules of law which have been attacked by this species of proof, but which have not yielded; those, in short, where, after a diligent examination, we have been unable to find a single judicial decision where evidence of usage or custom to control their legal effect has not been rejected. The first class requires no comment; the second may be left to take care of itself, the opinions of the judges in the affirmative being in every case a sufficient answer to the reasons given in the other cases against

<sup>1</sup> *Ante*, Chap. III., § 177.

<sup>2</sup> *Carson v. Blazer*, 2 Binn. 475.

<sup>3</sup> *Antomarchi v. Russell*, 63 Ala. 356.

<sup>4</sup> *Johanson v. Gillilan*, 8 Minn. 395.

<sup>5</sup> *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Shaw*

*v. Neale*, 6 H. L. Cas. 581.

<sup>6</sup> *Daun v. City of London Brewery Co.*, L.

R. 8 Eq. 155; *Menzies v. Lightfoot*, L. R. 11

Eq. 459. "The evidence of custom," said Romilly, M. R., in the last case, "is merely evidence of custom to give to a written document a meaning other than that affixed to it by the decision of the House of Lords."

<sup>7</sup> *Jackson v. Beling*, 22 La. An. 377.

<sup>8</sup> *Lockhart v. Dewees*, 1 Texas, 535.

## The Contradictory Cases Reviewed.

their admissibility. But as regards the third class, we have thought it well in this section, at the risk of repeating the language of courts and judges already set out in former portions of this book, to bring together those cases which have decided that certain rules of law cannot be altered or controlled by a different custom, wherever, and wherever only, no case sustaining the admissibility of usage in conflict with that particular rule can be found in the reports. These cases are not numerous; but the fact that they are, on principle, in direct conflict both with the weight of authority and with the views of the writer, would seem to justify their examination in this place. They will, therefore, be found in the next section.

§ 246. *The Facts and the Opinions of the Judges in the above Cases.*— In *Marine Bank of Chicago v. Chandler*,<sup>1</sup> the defendant asked the following instruction, which was refused: "If the jury believe from the evidence that it is the usage and custom of banks and bankers to mingle all the funds received by them in a common mass, and that according to such usage the defendant mixed the funds received on account of plaintiff with its own, and that its own funds, with which plaintiff's were mingled, were composed of the notes of the banks of Illinois received by it in its ordinary course of business for itself and its customers, which were afterwards depreciated in value from causes not within defendant's control, then the loss by such depreciation in defendant's funds must fall on him." In affirming the ruling and verdict below, WALKER, J., said: "Nor can the special custom of banks in a particular locality change the laws of the land regulating the value of the currency and fixing the standard value of the current coins. That parties may contract to receive any commodity in lieu of money in payment of indebtedness, is undeniably true. This can only be done by special agreement, and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of the particular place have been in the habit of receiving depreciated paper money in payment of their demands by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect, a special agreement must be proved." In *Thompson v. Riggs*,<sup>2</sup> the plaintiff had for a series of years deposited coin and paper money with the defendant, a banker. Coin at the time had one value, and paper money another and less value, and the different deposits were entered in his pass-books as of "coin" and "paper" respectively. Debts being at this time payable in "coin" only, the banker requested the plaintiff to make his full balance coin, which was done. Subsequently an act was passed making certain treasury-notes lawful money for the payment of debts. The plaintiff continued depositing "coin" and "treasury-notes," then regarded as currency, and both were entered accordingly. He afterwards drew for "coin"—the bulk of coin balance deposited before the act. Coin was refused, and tender made of treasury-notes. In an action brought for the market value of the coin drawn for,—the teller of the bank having testified that, after the act making treasury-notes a legal tender, his employer uniformly made with customers depositing with them a difference, in receiving and paying their deposits, between coin and

<sup>1</sup> 27 Ill. 526.<sup>2</sup> 5 Wall. 663.

## The Contradictory Cases Reviewed.

paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin; otherwise, treasury or bank notes, — the plaintiff offered evidence to show that the usage and mode of dealing between the said parties as stated by the teller was the usage of all the banks in that place. This evidence was considered in the Supreme Court of the United States as properly rejected. "The general rule of law is," said Mr. Justice CLIFFORD, "that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control the general rule of law, as it is not pretended that the evidence showed a special deposit. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law." In *Woodruff v. Merchants' Bank*,<sup>1</sup> a bill of exchange was in this form: —

"\$1,500.

DETROIT, November 15, 1838.

"Sixty days after date, pay to the order of Daniel Green, Esq., fifteen hundred dollars, at the Phoenix Bank in the city of New York, value received, which place to account.

"Your ob'd't serv't,

"L. GODDARD, Detroit, Mich.

"To Wm. H. Griswold, Esq., Cashier Oakland County Bank, Mich."

It was contended that, according to the custom of bankers and merchants in New York, this was a check, and was not entitled to the days of grace allowed on promissory notes and bills of exchange. But the Supreme Court said: "The effect of the proof of usage as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." In *Morrison v. Bailey*,<sup>2</sup> a similar instrument was sued on, viz.: —

"300.

CLEVELAND, OHIO, June 30, 1853.

"Wicks, Otis & Brownell: Pay to L. F. Burgess, on the thirteenth day of July, 1853, or order, three hundred dollars.

"R. B. BAILEY."

The testimony of a number of bankers showed a uniform custom on their part, in Cleveland, to regard drafts in this form as checks, and not entitled to days of grace. But the Supreme Court of Ohio, following *Woodruff v. Merchants' Bank*, held that "any supposed usage of banks in any particular place to regard drafts upon them payable at a day certain after date as checks, and not entitled to days of grace, is inadmissible to control the rules of law." In *Allen v. State Bank*,<sup>3</sup> the plaintiffs alleged that they were partners, and that one of them, having received a number of the defendant's bank-bills in the collection of debts due the firm, for the purpose of securing their safe transmission to the other, cut each of them into two parts, and enclosed the first halves on one day and the other halves on another day in letters by the public mail; that

<sup>1</sup> 25 Wend. 673.

<sup>2</sup> 5 Ohio St. 13.

<sup>3</sup> 1 Dev. & B. Eq. 3.

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the first parcel came duly to hand, but that the second was lost; that as soon as the loss was ascertained they presented to the defendants the halves received, offered indemnity against any loss by reason of the missing halves, and demanded payment of the whole amount of the bills; that the defendants paid them one-half of the sum, but refused to pay more. The bill prayed that the defendants might be required to pay the balance. The defendants replied, *inter alia*, that it was their custom to pay the holder of a half note, on presentation at their counter, one-half of the amount of the note, which custom was known to their dealers, and particularly to the plaintiffs; that this custom was adopted from regard to public convenience, and not upon a supposition of their liability, for they contended that no liability could be enforced except on the presentation of the entire note. The court decreed for the plaintiffs. GASTON, J., who delivered the opinion, said: "While the two parts exist and are retained by the lawful holder, the rights and liabilities of the parties remain precisely the same as before the division. If one of the parts be afterwards lost or destroyed, the right of the former holder of the note and the obligation of the maker are the same as though the whole note had been destroyed. Had the notes in this case been put into the mail in their original state, and then the loss occurred, it might with equal plausibility have been urged that the plaintiffs, for their own convenience, took upon themselves the risk of loss, and can therefore demand payment only according to the letter of the engagement. If the law warranted such a usage as that alleged by the defendants, of paying upon a half note, by whomsoever presented, half the amount of the note, the risk of injury to one or the other of the parties would be the same in the transmission by mail of a divided as of a whole note. In the former case there would be, indeed, a double chance of casualties, but only a danger of half a loss upon each casualty. Such a usage, however, is wholly unsupported by law. The holder of a half note, as such, has no right to any part of the money. Such a usage has a pernicious tendency to facilitate the receipt of money by the dishonest holders of half notes, and thereby creates or multiplies temptations to dishonesty. The transmission of divided notes by several mails diminishes the danger of injury as to one of the parties and does not increase it as to the other, is for the benefit of commerce, affords additional security against dishonesty by lessening the inducement to commit it, and ought in no manner to affect the rights of the lawful owners of the notes." In *Vermilye v. Adams Express Company*,<sup>1</sup> a number of United States treasury-notes which had been stolen from the express company were purchased by a firm of bankers after the date at which, on their face, they were payable or convertible into bonds. It appeared that the company, after the loss, had been prompt in giving warning of the theft, by advertising in the newspapers and delivering notices to the principal brokers, including the defendants. The latter introduced evidence to show that notes of the kind in question continued to be bought and sold by bankers and brokers after they had become due; that it was not customary for dealers in government securities to keep records or lists of the numbers or descriptions of bonds alleged to have been lost, stolen, or altered, or to refer to such lists before purchasing such securities; that it would be impracticable to carry on the business of dealing in government securities if it were necessary to resort to such lists and make such examination previous to

<sup>1</sup> 21 Wall. 139.



## The Contradictory Cases Reviewed.

purchase; and that the purchase of the notes in question was made in the ordinary and usual mode in which such transactions are conducted. It was held by the Supreme Court of the United States that, as to such overdue paper, a purchaser takes subject to the rights of antecedent holders, to the same extent as in the case of other paper bought after maturity, and that the notes could be recovered of the defendants. "Bankers, brokers, and others," said Mr. Justice MILLER, "cannot, as was attempted in this case, establish by proof a usage or custom, in dealing in such paper, which in their own interest contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences, nor establish a different law." In *Gallatin v. Bradford*,<sup>1</sup> B. was the cashier of the Kentucky Insurance Company at Lexington. G. having obtained from the company the discount of his note for \$300, he drew a check on B., in the name of F. & G., for the sum of \$296.85, being the amount he was entitled to receive on the note. B. paid him the amount of the check, as he supposed, but a few hours after it was discovered by a clerk in the office that G. had, by mistake, been overpaid the sum of \$100. G. having refused to pay back the money, B. brought an action to recover it. On the trial, evidence was offered, and rejected, going to prove a custom among banks and insurance companies not to rectify mistakes in the receipt or payment of money unless discovered before the person receiving or paying leaves the office. On appeal to the Court of Appeals of Kentucky, the ruling was affirmed. "If such a custom exists," said TRIMBLE, J., "it is contrary to law, and ought not to meet with the sanction of a court of justice. The law declares that money received through mistake shall be refunded, and this rule of law is founded on morality, which makes part of the law of the land. Would it not be as immoral and unjust, if a mistake were made in the receipt or payment of money at a bank, to hold the money obtained by such mistake, although not discovered until after the person paying or receiving had got out of the door, as if the mistake had been before discovered? There surely can be no difference in morality, and the law makes none. Such a custom in banking institutions may be an evidence of avarice, but not of the practice of justice among those concerned. We have no hesitation that if a mistake were made in favor of the insurance company, and they were to allege such a custom in bar of the correction of the mistake, the law would not sanction an attempt so palpably unjust." In *Emery v. Dunbar*,<sup>2</sup> the defendant's ship, on which were the plaintiffs' goods, was destroyed by a Confederate cruiser. In a suit for the freight, which they had paid before the sailing of the vessel, the defendant set up "that, at the time of the payment of the freight, it was, and from time immemorial thereuntil had been, the custom and usage of the United States of America and of the State of New York, and of the ship-owners, shippers, and merchants of, and of the shippers from the said United States of America and the State of New York, that said freight so paid in advance is paid unconditionally, and not subject to the risk of the voyage, and is not repaid, but is retained by the ship-owner, provided that the goods be taken on board and the voyage commence, or have commenced." The plaintiff demurred to this answer; the demurrer was sustained, and on appeal this ruling was affirmed. "Where a general rule or principle of law like this," said the Supreme Court, "has been long and well established, it cannot be controlled by proof of

<sup>1</sup> 1 Bibb, 209.<sup>2</sup> 1 Daly, 408.



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any usage to the contrary. This disposes of the defendant's answer." In *Feith v. Barker*,<sup>1</sup> one hundred and ninety hogsheads of sugar had been shipped at S., to be delivered at N.; but during the voyage, owing to a leak in the ship, the contents of fifty of them were lost, and but one hundred and forty were received by the consignee, who refused to pay freight on the residue. In a suit for the freight on the fifty hogsheads, the plaintiff offered to prove that, by the usage of merchants at N., freight was payable for the empty casks, under the circumstances of this case. A verdict being taken by consent for the full amount, subject to the opinion of the Supreme Court, it was there held that the plaintiff was entitled to a verdict for only one hundred and forty casks. KENT, C. J., who delivered the opinion of the court, after stating the law to be that no freight is due for goods which are destroyed during the voyage, said: "The next point is, whether evidence of usage in contradiction to this rule was admissible; and if it was, whether the usage proved went the length of establishing that freight was in this case due for the sugar that was destroyed. \* \* \* The testimony did not show that this usage existed, if the contents of the casks had been lost by the means of the sea perils during the course of the voyage. I presume that no such usage exists. It would be repugnant to the general rule of the maritime law. The true import of the testimony offered was that the master is entitled to his freight, notwithstanding the ordinary diminution or waste of an article, arising either from its nature or the defect of the cask. It becomes, therefore, immaterial to examine whether this evidence of usage was or was not strictly competent; but, as the question is frequently suggested, it may be proper to observe, that though usage is often resorted to for explanation of commercial instruments, it never is or ought to be received to contradict a settled rule of commercial law." In *Stebbins v. Globe Insurance Company*,<sup>2</sup> a policy of fire insurance contained no condition requiring the assured to give notice of changes in adjoining premises. On the trial, evidence was offered, and rejected by the trial court, which went to show that by a usage in New York, where the contract was made, upon the occurring of any circumstance whereby the risk was increased by the act of the assured after the effecting of the insurance, notice thereof was to be given to the insurers, so that they might have the option of continuing the policy or annulling it; on appeal the ruling was affirmed. The decision of the higher court did not rest altogether upon its being a usage local to New York, but upon the ground that "if it were a general usage it could not be given in evidence to alter the legal operation and effect of the policy." In *Hone v. Mutual Safety Insurance Company*,<sup>3</sup> it was held not competent to limit a contract of reinsurance by proof of a usage in the city of New York by which the reinsurer paid the same proportion of the entire loss sustained by the original insured that the sum reinsured bore to the first insurance written by the reinsured. "The word 'reinsure,'" said SANDFORD, J., "has a definite meaning settled in the law for two centuries past, and having the same meaning in its ordinary and popular sense. It is equally effective with the word 'insure,' and it has been decided that the word 'insure' may be used in a policy of reinsurance with the same force and validity. The proof offered attempts to wrest the term 'reinsure' from the established sense, and make it correlative, as between the first insurer and the reinsurer, whenever the former insures

<sup>1</sup> 2 Johns. 327.<sup>2</sup> 2 Hall, 632.<sup>3</sup> 1 Sandf. 137.

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answer." In *Frith* n shipped at S., in the ship, the ty were received In a suit for the , by the usage of der the circum- ull amount, sub- the plaintiff was KENT, C. J., who that no freight is "The next point admissible; and shing that freight The testimony sks had been lost I presume that rule of the mari- at the master is n or waste of an sk. It becomes, e was or was not ested, it may be r explanation of to contradict a *ence Company*,<sup>2</sup> a assured to give was offered, and ge in New York, instance whereby ing of the insur- they might have d the ruling was er upon its being e a general usage and effect of the held not compe- the city of New entire loss sus- ne first insurance FORD, J., "has a having the same ve with the word used in a policy ered attempts to ke it correlative, former insures

more than the latter, with the distinct and different contract of double insurance. In our view, it seeks to vary an express agreement between these parties couched in plain language, having an established legal as well as conventional meaning, and we are entirely clear that the testimony of usage ought not to be received." In *Diplock v. Blackburn*,<sup>1</sup> the plaintiffs were the executors of the captain of a ship, of which the defendant was the owner, and it appeared that, when at the Cape of Good Hope, the captain had occasion to draw a bill upon England on account of the ship, for the sum of £1,500, and on account of the exchange at the time he received as premium the sum of £134. The counsel for the plaintiffs contended that this money belonged to the testator, and offered to call witnesses to prove that it was usual for the captain of a ship, in such cases, to be allowed for his own benefit any advantage arising from the state of the exchange. But Lord ELLENBOROUGH ordered a nonsuit, saying: "I am clearly of opinion that this premium belonged to the owner, and not to the captain. If a contrary usage has prevailed, it has been a usage of fraud and plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty. I believe that in this very way servants of the public abroad have been guilty of enormous speculation. The testator was undoubtedly bound to debit himself for the £134 as much as for any other sum of money he received on the defendant's account." In *Minnesota Central Railroad Company v. Morgan*,<sup>2</sup> a custom among insurance agents that they are entitled to all dividends declared by mutual companies, in lieu of other compensation for effecting the insurance, was held bad. "No custom," said the court, "can be established which contravenes a well-settled principle of law. It has been the settled doctrine of the courts, both of law and equity, for centuries, that an agent cannot appropriate to his own use any portion of the profits arising from the business of his principal. The custom proposed to be established overrides this rule of law, and authorizes the agent, not to appropriate to himself a part only, but the whole of the property arising from the business of his principal. Such a custom needs only to be stated to be repudiated. If tolerated, it would lead to the grossest abuses. Insurance-brokers would be induced to become members of mutual insurance companies; all property intrusted to them would be insured in these companies, not infrequently without regard to expense, or even the responsibility of the company, so that it should exist long enough to enable them to dispose of the dividends which might be awarded to them. The rights of all the parties are best secured by requiring the broker to charge such commissions as he may be fairly entitled to, and permitting the customer to take whatever profits may be earned in the course of the business." In *Rustin v. Clark*,<sup>3</sup> the Court of Appeals of Maryland rejected evidence of a custom among brokers in the city of Baltimore that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the amount or value of the property received. Said MILLER, J.: "It is a general rule that a party cannot, in any agency of this kind, act as agent or broker for both vendor and vendee in respect to the same transaction, because in such case there is a necessary conflict between his interest and his duty. The vendor, in the employment of an agent to sell his property, bargains for the disinterested skill, diligence, and zeal of the agent for

<sup>1</sup> 1 Sandf. 137.

<sup>2</sup> 3 Camp. 43.

<sup>3</sup> 52 Barb. 217.

<sup>4</sup> 41 N.Y. 158, ante, p. 431.

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his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interest of the principal, as far as he lawfully may. The seller of an estate is presumed to be desirous of selling it at as high a price as can fairly be obtained for it, and the purchaser is equally presumed to desire to purchase it for as low a price as he may. The interests of the two are in conflict. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* But if the same party be allowed to act as agent for both, it becomes his interest to have this maxim reversed, or at least to sacrifice the interests of one or both of his principals in order to advance his own, by receiving double commissions. Hence the law will not permit an agent of the vendor, whilst that employment continues, to assume the essentially inconsistent and repugnant relation of agent for the purchaser. \* \* \* After what has been said, it is hardly necessary to add that the usage or custom relied on cannot avail the appellant. A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice.' In *Farnsworth v. Hammer*,<sup>1</sup> a similar custom among the brokers of Boston was rejected in the Supreme Judicial Court of Massachusetts, BIGELOW, C. J., delivering the opinion of the court, and using this language: "The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence to be reposed in the agent by them respectively, if his intent to act in the same transaction as agent of both is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do when he acts for two persons whose interests are essentially adverse. He is, therefore, guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them. Such being the well-settled rule of law, it follows that the evidence offered by the plaintiff was inadmissible. A custom or usage, to be legal and valid, must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in

<sup>1</sup> 1 Allen, 404.

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these essential elements. It would be unreasonable, because if established it would operate to prevent the faithful fulfilment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents." In *Magee v. Atkinson*,<sup>1</sup> A., a broker employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in his book as of a sale from A. to C., and a contract-note to that effect was sent to C. A. subsequently saw the entry in the book, and altered it by writing in the name of B. as seller. Another note was accordingly sent the same evening or the next morning to C., but C. received them both together; he did not return the first note, nor did A. request it. In an action by D. against A. for breach of the agreement in not completing the sale, *PATTERSON, J.*, left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting merely as a broker, and that, although known to be a broker, if he signed the contract in his own name he was liable. He also rejected evidence that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name. The plaintiff having recovered a verdict, the direction and ruling of the trial judge were affirmed by the court *in banc*. "The custom offered to be proved," said *ALDERSON, B.*, "is a custom to violate the common law of England." In *Trueman v. Loder*,<sup>2</sup> L., a merchant residing at St. Petersburg, carried on a business in London through H. H., having ceased to represent L., contracted with T. to sell him tallow, intending to make the contract for himself, but T. thought him an agent for L., as before. The contract was made by W., a broker acting for both. He signed bought-and-sold notes, the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals." It was held that L. was liable for the non-delivery of the tallow, and that evidence of a custom in the tallow trade that "a party might reject the undisclosed principal, and look to the broker for the completion of the contract, was inadmissible." In *Barnard v. Kellogg*,<sup>3</sup> A., a wool-broker in Boston, sent to B., a wool-dealer in Hartford, samples of foreign wools in bales, which he was selling on commission, and B. offered to purchase at the prices stated, if equal to the samples. A. accepted the offer, provided B. would come to Boston and examine the wool. B. went to Boston, and after examining a portion of the bales (and having the opportunity to examine all and open them, which he declined), purchased the wool. It proved, however, unknown to A.'s principal, to have been deceitfully packed, and much in the interior of the bales was rotten and worthless. In an action brought by B. against the principal to recover damages, it was held by the Supreme Court of the United States that the rule of *caveat emptor* applied, and that evidence was not admissible to control that rule, and to show that by the custom of merchants and dealers in wool in bales in Boston and New York, — the two principal markets in the country for wool, — there is an implied warranty by the seller to the purchaser that the wool is not falsely or deceit-

<sup>1</sup> 2 Moo. & W. 410.<sup>2</sup> 11 Ad. & E. 589.<sup>3</sup> 10 Wall. 383, *ante*, p. 424.

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fully packed. "It is apparent," said Mr. Justice DAVIS, "that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do; and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade in the manner proposed by the custom of dealers in wool in Boston, it is easy to see it can be changed in other particulars, and in this way the whole doctrine frittered away." In *Dodd v. Farlow*,<sup>1</sup> a usage in the hide and leather trade in Boston to impliedly warrant all goods to be of merchantable quality was rejected. "The decisive objection to its recognition," said BIGELOW, C. J., "is that it embraces an element directly contrary to the ancient and well-established rule of the common law, that a vendor cannot be held responsible for the quality of goods sold, if he makes no warranty or representation concerning their nature, condition, or merchantable value. In other words, it abrogates to a certain extent the maxim *caveat emptor*, and puts on the vendor the burden of warranty, although he may be ignorant of the quality of the articles, or may have had no means of ascertaining their condition or value, and may have had no intention of selling the articles with warranty. Such a usage is very like the one relied upon in the leading case of *Thompson v. Ashton*,<sup>2</sup> which was held invalid and of no effect, because it tended to introduce vagueness, confusion, and uncertainty into the rules regulating the rights and obligations of parties under contracts for the sale of merchandise." In *Thompson v. Ashton*,<sup>3</sup> which was decided by the Supreme Court of New York in 1817, the plaintiff's agent went to the store of the defendant to purchase crockery-ware, and the latter sold him forty-six crates of crockery-ware, according to the printed catalogue of certain auctioneers in whose store the crockery was for sale, which catalogue conformed to the invoice. The agent did not open the crates, but after they were sent to the plaintiff several of them were found to be bad, consisting of ware of an inferior quality. The plaintiff desired to rescind the sale, but the defendant refusing, he brought an action for the fraud, and on the trial offered to prove that it was the custom and usage of merchants in this article that the purchaser purchased and the seller sold on the invoices without opening the crates or examining the ware in them, and that it was the uniform understanding in the trade, in such transactions, that the exhibition of the invoices amounted to an undertaking on the part of the seller that the ware was good and merchantable. The trial judge rejected this evidence, and the plaintiff was nonsuited. On appeal, the court sustained the ruling, saying: "The evidence offered of a usage or custom in relation to the sale of crockery-ware was properly rejected. No custom in the

<sup>1</sup> 11 Allen, 426.<sup>2</sup> 13 Johns. 416.<sup>3</sup> *Supra*.

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sale of any particular description of goods can be admitted to control the general rules of law. Such a principle would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law in the sale of chattels." In *Dickinson v. Gay*,<sup>1</sup> a sale had been made of unprinted satinge cloths purchased of the manufacturers by sample, and it appeared that the bulk of the goods was not equal to the sample; that both the sample and the bulk of the goods were damaged by mildew, and that the defect was latent and could not be discovered until the goods were printed. The defendant offered evidence in an action for the price of the goods, of a usage of merchants by which, in such cases, the seller should make good to the purchaser the damage occasioned by the defect. The court admitted this evidence, and the jury, in answer to special questions, found that the usage existed; that there was a defect in the goods; that it diminished their value in the sum of \$1,456.23; that the goods were not equal to the sample, and that this last defect diminished the value of the goods in the sum of \$517.18. The plaintiff had a verdict for the balance of the price at which the goods were bargained for, deducting the sum of \$517.18—thus rejecting the effect of the usage. On appeal, the judgment was affirmed, the court holding that the deduction of \$517.18 was properly allowed. "The sale," said CHAPMAN, J., "was by sample. On such a sale it is admitted that the law implied a warranty that the bulk of the goods shall be equal in quality to the sample. The jury have found that these goods were not equal to the sample, and have assessed the damages at \$517.18. This sum is, therefore, to be deducted from the agreed price." But the usage set up in the case was adjudged invalid. After reviewing the cases in which usages in opposition to rules of law had been rejected, CHAPMAN, J., said: "There is no necessity for such usages; because, if the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale, or if the manufacturer sells without warranty, he can so express it. But if such usages were to prevail they would be productive of misunderstanding, litigation, and frequent injustice, and would be deeply injurious to the interests of trade and commerce. They would make it necessary to prove the law of the case by witnesses on the stand, and it would be settled by the jury in each particular case. Public policy, therefore, requires that where parties assume obligations which the law does not impose, or release obligations which it does impose, it should be done by express contract." In *Whitmore v. South Boston Iron Company*,<sup>2</sup> a usage of foundries not to warrant their castings against latent defects, or, in the case of patent defects, to be entitled to have the castings returned in a reasonable time, and to have the option of replacing them with new ones, was rejected. In *Markham v. Jaudon*,<sup>3</sup> the defendants, who were stock-brokers, purchased certain stocks for plaintiff in their own names and with their own funds, he depositing with them a "margin" of ten per cent, which he agreed to "keep good." The plaintiff having failed to "keep the margin good," the defendants sold out the stock without notice to him. It was held by the Court of Appeals that the relation between the parties was that of pledgee and pledgor; that a sale under such circumstances without notice was a conversion; and that, in an action by the plaintiff for such conversion, evidence of a usage that stock held as in this case might be sold by the broker whenever, by the fall

<sup>1</sup> *Supra*.<sup>2</sup> 7 Allen, 29.<sup>3</sup> 2 Allen, 52.<sup>4</sup> 41 N. Y. 235.



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of the stock in the market, the "margin" was exhausted and not renewed, was inadmissible, because in direct variance with the rules of law applicable to the relation of the parties. "This was an offer," said HUNT, C. J., referring to the evidence rejected, "not to explain the meaning of particular terms, or to prove attending circumstances, to enable the court to construe the agreement, but to change the rights of the parties to a contract. By the law, as I have interpreted it, the customer did not lose the title to his stock by any process less than a sale upon reasonable notice, or by judicial proceedings. The broker had no right to sell without such a notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase the shares at all, in a case like the present, but to content themselves with a memorandum or entry in their books of the contract made with their customer." This case was followed, seven years later, in *Baker v. Drake*,<sup>1</sup> decided in the same court in 1876.

§ 247. Same.—The above Cases examined.—CHAPMAN, J., in *Dickinson v. Gay*,<sup>2</sup> attempted to reconcile the cases in which usages operating in contravention of law have been admitted with those in which similar usages have been rejected. The former he described and classed as having reference to peculiar habits, modes, or courses of business; the latter, as adopting a peculiar or local rule of law contrary to a general rule of law applicable to the particular case. But he was forced to admit that the distinction was rather fine, and would by no means reconcile all the contrary cases. It is plain that the cases which we have grouped in the preceding section are capable of no such classification, and can be tested by no such principle as suggested in *Dickinson v. Gay*. They exhibit, on the contrary, so serious a conflict with the principles upon which rest those decisions in which evidence of usage has been admitted for the purpose of carrying out the agreements of parties that any attempt to reconcile them becomes impossible. Of the score or more of cases set out in the previous section, in which commercial custom were rejected by different courts, not more than three or four can, in the light of the law as exhibited in this treatise, be sustained; and even in these cases their inadmissibility depended, not on their being in conflict with a rule of law, but on their violating a rule of public policy. Thus, the custom of bankers to mix all the funds received by them in a common mass;<sup>3</sup> to distinguish between coin and paper in the paying of deposits;<sup>4</sup> to regard certain instruments as checks, and not entitled to days of grace;<sup>5</sup> the custom of insurers to receive notice of increased risks,<sup>6</sup> or to limit the contract of reinsurance;<sup>7</sup> the usage of brokers that a vendee might, at his option, reject the undisclosed principal and look to the broker for the completion of the contract;<sup>8</sup> the custom of merchants that on the sale of wool there is an implied warranty that the wool is not falsely or deceitfully packed,<sup>9</sup> that goods sold are of merchantable quality,<sup>10</sup> that the seller should make good to the buyer damages arising

<sup>1</sup> 66 N. Y. 519.

<sup>2</sup> 7 Allen, 20.

*Marine Bank v. Chandler*, *ante*, § 246.

<sup>4</sup> *Thompson v. Riggs*, *ante*, § 246.

<sup>5</sup> *Woodruff v. Merchants' Bank*, *Morrison*

*Stanley*, *ante*, § 246.

<sup>6</sup> *Stebbins v. Globe Ins. Co.*, *ante*, § 246.

<sup>7</sup> *Hone v. Mutual, etc., Ins. Co.*, *ante*, § 246.

<sup>8</sup> *Trueman v. Loder*, *Magee v. Atkinson*, *ante*, § 246.

<sup>9</sup> *Barnard v. Kellogg*, *ante*, § 246.

<sup>10</sup> *Dodd v. Farlow*, *Thompson v. Ashton*, *ante*, § 246.

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from hidden defects,<sup>1</sup> or that manufacturers do not warrant against latent defects,<sup>2</sup>—all of which, in individual cases, have been rejected, — are different in kind, but not in degree, from the multitude of similar usages and customs of trade which, as already seen in the third chapter of this work, have been admitted in evidence. Other customs there are which differ essentially from these, and which have been properly looked upon by the courts with disfavor. And here we find at last the correct test by which to try the admissibility of a usage or custom. Thus, the custom of bankers to pay but one-half the amount of a note when only half of it was presented by the holder, which was rejected in *Allen v. State Bank*;<sup>3</sup> the custom of brokers not to regard the fact that a bond presented to them for purchase was overdue, which was held invalid in *Vermilye v. Adams Express Company*;<sup>4</sup> the custom of banks not to rectify mistakes in the receipt or payment of money unless discovered before leaving the office, which was rejected in *Gallatin v. Bradford*;<sup>5</sup> the custom of carriers that freight-money received and not earned is nevertheless not returned, which was declared void in *Emery v. Dunbar*<sup>6</sup> and *Frith v. Barker*;<sup>7</sup> the custom of captains of vessels to retain profits of exchange on bills drawn on the owners, which was rejected in *Diplock v. Blackburn*;<sup>8</sup> the usage of insurance agents to take all dividends declared by mutual companies in lieu of other compensation for effecting the insurance, which was held invalid in *Minnesota Central Railroad Company v. Morgan*;<sup>9</sup> the usage of brokers to act for both parties to a sale or exchange of property, and to claim compensation from both, which was declared void in *Raisin v. Clark*<sup>10</sup> and *Farnsworth v. Hammer*<sup>11</sup> — all these usages, and all such of similar character and effect, are open to a more serious objection than that they conflict with an "established rule of law." The first, as said in *Allen v. State Bank*,<sup>12</sup> "has a pernicious tendency to facilitate the receipt of money by the dishonest holders of half notes, and thereby creates or multiplies temptations to dishonesty." The second would also place a premium upon dishonesty by abolishing all the guards which the law has thrown around the title of a *bona fide* holder of negotiable paper. The third and fourth are so unjust on their face that they could hardly be defended on any ground, while the fifth, sixth, and seventh violate the most necessary rules which the law has established for the purpose of requiring good faith in the dealings of an agent with his principal. All of them violate not only legal rules, but the principles of justice and fair dealing.

§ 248. **The Meaning of the Rule that a Usage must not conflict with the Law.** — In the light of this principle, the meaning of the rule that a usage or custom must not conflict with the law becomes clear, and the rule itself easy of application. The language of the judges from whose opinions we have cited in § 226 is incorrect, because it is unqualified. A usage or custom, as we have already shown, is not invalid simply because it is different in its effect from the

<sup>1</sup> *Dickinson v. Gay*, 7 Allen, 20.

<sup>2</sup> *Whitmore v. South Boston Iron Co.*, 2

Allen, 52.

<sup>3</sup> 1 Dev. & B. Eq. 3.

<sup>4</sup> 21 Wall. 139.

<sup>5</sup> 1 Bibb, 200.

<sup>6</sup> 1 Daly, 108.

<sup>7</sup> 9 Johns. 327.

<sup>8</sup> 43.

<sup>9</sup> 52 Barb. 217.

<sup>10</sup> 41 Md. 158, ante, p. 431.

<sup>11</sup> 1 Allen, 494.

<sup>12</sup> *Supra*.

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general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relations to each other; if, in short, it is an unjust, oppressive, or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz., *reasonableness*.<sup>1</sup>

<sup>1</sup> *Ante*, Chap. I., §§ 32, 45.

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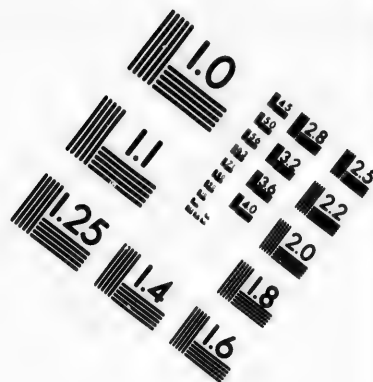
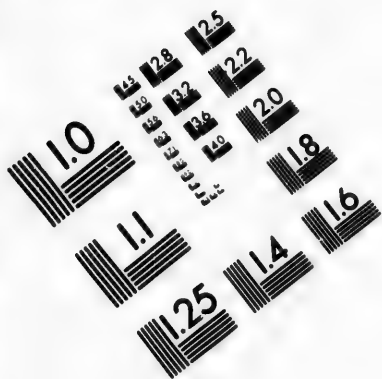
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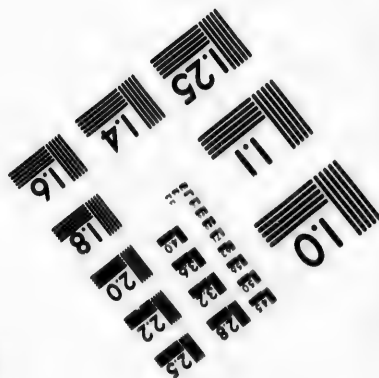
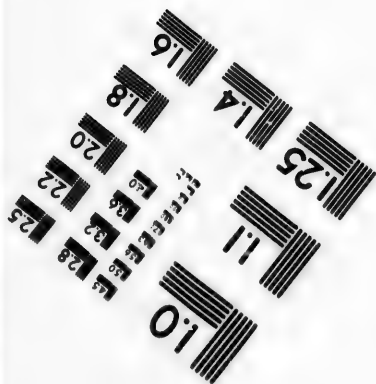
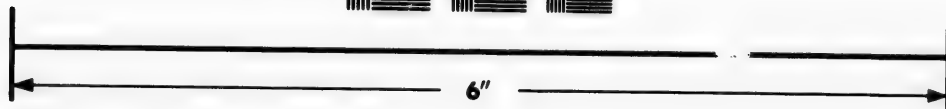
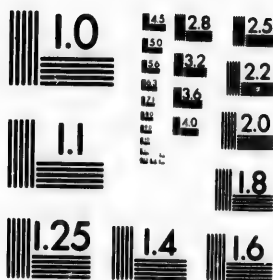
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The authorized officers of a municipality having decided to erect a public building, offered prizes for the best plans, with costs, etc. T., an architect, was awarded one of the prizes, with notice that "the award should not be considered as indicating a preference for either of said plans, as to which should be finally adopted, from which the said building should be erected," and the amount of the prize (\$1,000) was paid to him. Subsequently, by resolution, the officers adopted T.'s plan, subject to conditions. *Held* that this resolution was a voluntary act of the officers, and did not amount to a contract between them and T. *Held, further*, that in an action by T. against the officers, evidence of a usage and custom among architects that in the absence of a special contract the superintendence of the construction of a building belongs to the architect whose plans are adopted, and that where prizes for plans are offered the plans of the successful competitors belong to them, and if subsequently adopted as the plans to build by, they are always paid for in addition to the prize itself, was properly excluded. *Tilley v. City of Chicago*, 356.

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A. agreed to make B. a "satisfactory" suit of clothes. A. afterwards delivered the clothes to B., but B. returned them to A. with a notice that they did not fit, and were unsatisfactory. In a suit by A. against B. for the price: *held*, that evidence that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations that might be necessary to make them fit, was inadmissible, because it contradicted the terms of an express contract. *Brown v. Foster*, 417.

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- M. & W.*, fruit-brokers in London, being employed by *F. & D.*, merchants in London, to sell for them, gave them the following contract note, addressed to *F. & D.*: "We have this day sold for your account to our principal \* \* \* tons of raisins. *M. & W.*, brokers." The principal having accepted part of the raisins, and not having accepted the rest, *F. & D.* brought an action on the contract against *M. & W.*, and sought to make them personally liable by the custom of the trade. On the trial, in addition to evidence of a custom in the London fruit-trade that if brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal, they offered evidence of a similar custom in the London colo-

testimony of  
familiar with the  
might be had.

the *fact*, 100.

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a custom on the part of all the banks in a particular place to demand payment and give notice to indorsers of negotiable paper on the fourth day of grace is binding on an indorser if known to him. *Renner v. Bank of Columbia*, 116.

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- in a policy of fire insurance upon printing and book materials in a building, privileged for a printing-office and bindery, there was a condition exempting the insurer from liability for any loss occasioned by camphene. The property insured was destroyed by a fire caused by a workman accidentally dropping a lighted paper into an open jar of camphene, which was kept in the building for use in the business. In an action on the policy, the jury having found that when the policy was effected it was the general and established custom among printers to use camphene in the printing of books, and that its use was not only advantageous, but necessary: *held*, that the exemption extended only to a loss occasioned by the use of camphene for purposes other than that of printing. *Harper v. City Ins. Co.* 148.
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  - a custom that a tenant, whether of parol or deed, shall have the waygoing crop after the expiration of his term is good. *Wigglesworth v. Dallison*, 169.
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  - may show length of hiring, 276.
  - in an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged. *Held*, that he might show that it was customary for editors of newspapers to be engaged for a year unless there was an express stipulation to the contrary. *Holcroft v. Barber*, 175.
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    - it is the custom on the Alabama River for the proprietors of steamboats to purchase salt at Mobile, to be carried up the river and sold. *Held*, that in the absence of a contrary stipulation in a partnership agreement made for the purpose of running a steamboat on that river, the firm would be liable for salt purchased by a partner at Mobile for transportation and sale on the boat. *Waring v. Grady*, 178, 281.
  - usage as to name of firm, 282.
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    - or marking merchandise, 284.
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    - T.*, a factor, having goods consigned to him by *G.*, sold them on three months' credit, taking in payment the purchaser's promissory note to himself, but the purchaser, before the maturity of the note, became bankrupt. In an action by *G.* against *T.* for the value of the goods sold: *held*, that evidence that he had acted according to the custom of the place was admissible, and would discharge him from liability. *Goodenow v. Tyler*, 180.
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- or retainers, 303.
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  - A. purchased of B. a number of bales of cotton, at a certain price per pound. Several months prior to the sale the cotton had been weighed by the wharfinger, and marked on the bags and in the books at 63,013 pounds. When the cotton was delivered it was reweighed by A., and found to amount to only 61,205 pounds. A. thereupon paid B. for the cotton as of the latter weight, but refused to pay for more than he had actually received. In a suit by B. against A. for the difference, it was proved that, according to the custom of the trade, cotton was weighed by the wharfinger before it was put in store, and the weight marked on the bags and entered in books kept for that purpose, and that where a sale was made without any stipulation to the contrary, it was understood as being made upon the basis of the weights thus ascertained. *Held*, that A. was bound by the custom, and that B. was entitled to recover. *Cowan v. Robinson*, 190.
  - other illustrations, 304, 305.
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- a warranty may be implied from the custom of a particular trade. It being usual, in the sale by auction of drugs, to state in the catalogue if they were sea-damaged or not, and if nothing is said as to their quality, they are supposed to be sound, the defendants offered for sale a quantity of sea-damaged pimento, without saying anything about its condition, which was purchased by the plaintiff. *Held*, that this was equivalent to a sale of the goods as and for goods that were not sea-damaged, and that an action lay for the fraud. *Jones v. Bowden*, 186.
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    - where a custom exists in a certain business for the buyer to leave goods bought by him in the hands of the seller, and it is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom do not, on the bankruptcy of the seller, pass to his assignee under the Bankruptcy Act. *Priestley v. Pratt*, 201.
  - other illustrations, 314, 315.
- payment may be made according to usage, 315.
  - illustrations, 316.
- where there is a general usage in any particular trade or business to charge and allow interest, parties having knowledge of the usage are deemed to contract with reference to it. *Esterly v. Cole*, 198.
- although the law does not in general give interest upon an open running account for goods sold, yet an agreement to pay interest may be inferred from a uniform practice of the creditor to charge interest, known to the customer. *Ibid.*
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In a lease of a rabbit-warren, the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits, the lessor paying for them £30 per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term: *held*, that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted *twelve hundred*. *Smith v. Wilson*, 335.

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The authorized officers of a municipality having decided to erect a public building, offered prizes for the best plans, with costs, etc. T., an architect, was awarded one of the prizes, with notice that "the award should not be considered as indicating a preference for either of said plans, as to which should be finally adopted, from which the said building should be erected," and the amount of the prize (\$1,000) was paid to him. Subsequently, by resolution, the officers adopted T.'s plan, subject to conditions. *Held*, that this resolution was a voluntary act of the officers, and did not amount to a contract between them and T. *Held*, further, that in an action by T. against the officers, evidence of a usage and custom among architects that in the absence of a special contract the superintendence of the construction of a building belongs to the architect whose plans are adopted, and that where prizes for plans are offered the plans of the successful competitors belong to them, and if subsequently adopted as the plans to build by, they are always paid for in addition to the prize itself, was properly excluded. *Tilley v. City of Chicago*, 336.

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(See WORDS AND PHRASES.)

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(See WORDS AND PHRASES.)

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defendants, brokers, being employed by S. to purchase oil, signed a note as follows: "Sold this day for Messrs. T.," plaintiff's brokers, "to our principals, ten tons of linseed oil," etc., "quarter per cent brokerage to" defendants. This note defendants delivered to Messrs. T. *Defend-*

CUSTOM AND USAGE — *Continued.*

ants did not disclose the name of their principal, S., who became insolvent and did not accept the oil. Plaintiff then sued defendant for not accepting the oil, laying the sale as by himself to defendants. Defendants denied the contract. On the trial, plaintiff proved a custom in the trade that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as purchaser. *Held*, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms or adding a tacitly implied incident, and that the action lay. *Humfrey v. Dale*, 342.

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a contract for the excavation of lots in a city, so as to make them conform to a certain plan, was silent as to whom should belong the sand or other material taken therefrom. A custom existed, long established and notorious, that it went to the excavator, and not to the owner of the lots. *Held*, that evidence of the custom was admissible to explain the contract of the parties. *Cooper v. Kane*, 339.

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(*See also WORDS AND PHRASES.*)

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  - a testator gave to certain devisees "all my back lands," *Held*, that parol evidence was admissible to designate the premises, as by showing that certain lands owned by him were usually known by that description to him, and among his family and neighbors. *Ryerss v. Wheeler*, 351.
  - to explain devisee by evidence of usage, 398.
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    - in an action of a policy of insurance on a ship, her tackle, apparel, *boat*, and other furniture, evidence of a usage that boats slung on the outside of the ship, on the quarter, are not protected, is inadmissible, as contradicting the express terms of the contract. *Blackett v. Royal Exchange Assur. Co.* 413.
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  - A. agreed to make B. a "satisfactory" suit of clothes. A. afterwards delivered the clothes to B., but B. returned them to A. with a notice that they did not fit, and were unsatisfactory. In a suit by A. against B. for the price: *held*, that evidence that a custom existed among tailors of having garments tried on after they were finished, and then making

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it is a rule of law that an agent cannot act as such for both vendor and purchaser, and receive payment for his services from both. Therefore, a custom among brokers in the city of Baltimore that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the value of the property exchanged, is invalid. *Raisin v. Clark*, 481.
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M. & W., fruit-brokers in London, being employed by F. & D., merchants in London, to sell for them, gave them the following contract note, addressed to F. & D.: "We have this day sold for your account to our principal \* \* \* tons of raisins. M. & W., brokers." The principal having accepted part of the raisins, and not having accepted the rest, F. & D. brought an action on the contract against M. & W., and sought to make them personally liable by the custom of the trade. On the trial, in addition to evidence of a custom in the London fruit-trade that if brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal, they offered evidence of a similar custom in the London colonial market. *Held*, that the latter was also admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. *Fleet v. Merton*, 90.

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- In a lease of a rabbit-warren, the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits, the lessor paying for them £69 per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term: *held*, that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted *twelve hundred*. *Smith v. Wilson*, 335.
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- in an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged. *Held*, that he might show that it was customary for editors of newspapers to be engaged for a year unless there was an express stipulation to the contrary. *Holcroft v. Barber*, 175.
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- A. agreed to make B. a "satisfactory" suit of clothes. A. afterwards delivered the clothes to B., but B. returned them to A. with a notice that they did not fit, and were unsatisfactory. In a suit by A. against B. for the price: *held*, that evidence that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations that might be necessary to make them fit, was inadmissible, because it contradicted the terms of an express contract. *Brown v. Foster*, 417.
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  - T., a factor, having goods consigned to him by G., sold them on three months' credit, taking in payment the purchaser's promissory note to himself. but the purchaser, before the maturity of the note, became bankrupt. In an action by G. against T. for the value of the goods sold: *held*, that evidence that he had acted according to the custom of the place was admissible, and would discharge him from liability. *Goodenow v. Tyler*, 180.
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  - defendants, brokers, being employed by S. to purchase oil, signed a note as follows: "Sold this day for Messrs. T.," plaintiff's brokers, "to our principals, ten tons of linseed oil," etc., "quarter per cent brokerage to" defendants. This note defendants delivered to Messrs. T. Defendants did not disclose the name of their principal, S., who became insolvent and did not accept the oil. Plaintiff then sued defendant for not accepting the oil, laying the sale as by himself to defendants. Defendants denied the contract. On the trial, plaintiff proved a custom in the trade that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as purchaser. *Held*, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms or adding a tacitly implied incident, and that the action lay. *Humfrey v. Dale*, 342.
  - other cases, 382-386.
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    - it is a rule of law that an agent cannot act as such for both vendor and purchaser, and receive payment for his services from both. Therefore, a custom among brokers in the city of Baltimore that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the value of the property exchanged, is invalid. *Raisin v. Clark*, 431.

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- usage in strawberry business to put all big strawberries at top of box unreasonable, 11.
- a custom of a particular port that seamen's advance wages due under the shipping-articles shall be paid to the shipping-agent, to be paid by him to the boarding-house keeper bringing the seamen, for their benefit, is unreasonable, and does not bind the seamen, although known to them at the time of signing the articles. *Metcalfe v. Weld*, 12.
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A. purchased of B. a number of bales of cotton, at a certain price per pound. Several months prior to the sale the cotton had been weighed by the wharfinger, and marked on the bags and in the books at 63,043 pounds. When the cotton was delivered it was reweighed by A., and found to amount to only 61,205 pounds. A. thereupon paid B. for the cotton as of the latter weight, but refused to pay for more than he had actually received. In a suit by B. against A. for the difference, it was proved that, according to the custom of the trade, cotton was weighed by the wharfinger before it was put in store, and the weight marked on the bags and entered in books kept for that purpose, and that where a sale was made without any stipulation to the contrary, it was understood as being made upon the basis of the weights thus ascertained. *Held*, that A. was bound by the custom, and that B. was entitled to recover. *Conner v. Robinson*, 190.

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